

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

DOCKETED FOR ORAL ARGUMENT

No. 100-10000

THE PROSECUTOR AND ROBERT S. GORDON, JR.

THE DEFENSE COUNSEL

(22,502.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 881.

P. E. HECKMAN AND ROBERT L. OWEN, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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- 1 Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1910, of Said Court, Before the Honorable William C. Hook and the Honorable Elmer B. Adams, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the seventeenth day of September, A. D. 1909, a transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The United States of America is Appellant, and John F. McClellan, et al., are Appellees, which said transcript of record is in the words and figures following, to-wit:

- 2 In the Circuit Court of the United States, Eastern District of Oklahoma.

No. —.

THE UNITED STATES, Appellant,
vs.
JOHN F. MCCLELLAN et al., Appellees.

The following is a transcript of such of the record and proceedings heretofore had in said case as has been ordered to be prepared and authenticated as necessary to the hearing in the Court of Appeals.

(a) The Bill of Complaint was filed in the office of the Clerk on the first day of August, 1909, and, with the endorsements thereon, except as to those transactions in paragraph six of the bill as to which special orders of dismissal upon the petition of the complainant have been heretofore entered, is as follows:

3 In the Circuit Court of the United States for the Eastern District of Oklahoma.

In Equity. No. 429.

UNITED STATES OF AMERICA, Complainant,
vs.
JOHN F. McCLELLAN et al., Defendants.

To the Honorable Judge of the Circuit Court for the Eastern District of Oklahoma:

The United States of America, by Charles J. Bonaparte, Attorney-General of the United States, and William J. Gregg, United States Attorney for the Eastern District of Oklahoma, brings this bill, upon the recommendation of the Secretary of the Interior, against: John F. McClellan of Claremore, Oklahoma, a citizen of the State of Oklahoma; Thomas J. Watts of Muldrow, Oklahoma, a citizen of the State of Oklahoma; James P. Allen of Muskogee, Oklahoma, a citizen of the State of Oklahoma; Robert L. Owen of Muskogee, Oklahoma, a citizen of the State of Oklahoma; Geo. E. Gilmore of Stilwell, Oklahoma, a citizen of the State of Oklahoma; J. Warren Reed of Muskogee, Oklahoma, a citizen of the State of Oklahoma; C. B. Muropulos of Vinita, Oklahoma, a citizen of the State of Oklahoma; Fred W. Davis of Muskogee, Oklahoma, a citizen of the State of Oklahoma; P. E. Heckman of Muskogee, Oklahoma, a citizen of the State of Oklahoma; S. A. McSpadden of Chelsea, Oklahoma, a citizen of the State of Oklahoma; and thereupon your orator complains and says:

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First.

Your orator shows that, pursuant to the terms of the treaties entered into between your orator and the Cherokee tribe of Indians, and the members thereof, your orator granted, by patent duly executed and delivered to the said Cherokee tribe of Indians, certain lands located in the Indian Territory, now the Eastern District of Oklahoma, and that by the terms of said treaties and of the laws of the United States, your orator solemnly obligated itself to secure and protect the said Cherokee tribe of Indians and the members thereof, in the possession, use and enjoyment of, and the title of the lands as granted to them as aforesaid, and that, according to the terms of said treaties and of said Acts of Congress relating thereto, and of the patent to said lands, the said Cherokee tribe of Indians and every member thereof have at all times been, and now are, without power to dispose of any part of said lands or of any interest therein without the consent and authority of your orator, or otherwise than in the manner prescribed by your orator. The lands hereinafter in paragraph numbered six described are a part of the lands aforesaid.

Second.

Your orator further shows that the sovereign, the Government of the United States, by reason of the helpless and dependent character of the Indian Tribes and Nations, and of the several members thereof within its borders, especially the Cherokee tribe of Indians and the several members thereof, is the guardian, and has exclusive dominion over and control of the property of said tribes of Indians and of the several members thereof, especially the said Cherokee tribe of Indians and the several members thereof, by virtue of which there is imposed upon your orator the duty to do whatever may be necessary for their guidance, welfare and protection; that the said Cherokee tribe of Indians has always been, and is now recognized, treated and dealt with as a tribe of Indians by the Government of the United States and the several branches thereof; that said tribe of Indians is now under the care of an Indian Agent, duly appointed under the laws of the Congress of the United States; that the Congress of the United States still appropriates large sums of money for the benefit and protection of the said tribe of Cherokee Indians and of the individual members thereof, and for the maintenance of schools for the education of the members of the said tribe; that the Government of the United States, under and by virtue of the laws of the Congress of the United States, still has a large sum of money in its possession belonging to the said tribe of Indians, and that there still remains unallotted a large area of tribal lands the common property of the said tribe.

Third.

Your orator further shows that in the exercise of its powers so to regulate, control, and govern the affairs of the said Cherokee tribe of Indians and the members thereof, having in view the welfare of the said Indians and the carrying out of its treaty obligations, the Congress of the United States, by an Act approved July 1, 1902, the same being found in 32 Statutes at Large, page 716, provided that the land belonging to the said Cherokee tribe of Indians in the present State of Oklahoma should be allotted in severalty among the members thereof, but deeming the said Indians to be untutored and improvident and still requiring the protection and supervision of the General Government, it was provided by the said Act of July 1, 1902, that the portion of the lands so allotted to the members of the said tribe as homesteads should be inalienable, and further, that the lands other than homesteads allotted to the members of said tribe should be alienable only in five years after the issuance of patent to the allottee, and not before such time, and that, in accordance with the provisions thereof, the said Act of Congress was duly accepted and ratified by the Cherokee people on the 7th day of August, 1902.

Fourth.

Your orator further shows that each of the tracts of land hereinafter described in paragraph six is situated in the Eastern District of

Oklahoma, and was, at the time of the transactions mentioned hereinafter in paragraph six, lands of the Cherokee tribe of Indians which had been allotted to full blood Indians of that tribe, namely: the persons mentioned in paragraph six hereof, as granting or transferring the same; that they were so allotted that they were subject to restrictions upon their alienation and incumbrance; that such allotments were so subject to restrictions upon alienation and incumbrance at the date of the execution and recording of the deeds and other instruments of writing mentioned in paragraph six hereof, which said restrictions have never been removed, and still exist; that the facts concerning the said allotments and restrictions were matters of public record and notorious; that the restrictions were imposed by public laws of the United States, of which defendants had knowledge, and said laws put defendants upon inquiry and notice as to all matters concerning the condition of the particular tracts of land mentioned in paragraph six hereof.

Fifth.

Your orator further shows, that each of the deeds, mortgages, leases, contracts of sale, powers of attorney, and other evidences of title or incumbrance upon tracts of land as hereinafter set forth, as secured by defendant in defiant, willful and open violation of law, and of the duty which rested upon this nation and every member thereof, and for the purpose of unlawfully encumbering said lands allotted to members of the said Cherokee tribe of Indians, all of whom, under the treaties and laws of the United States, were without power or authority to sell, alienate or incumber said lands in any manner whatsoever.

And your orator further shows that by filing for record and causing to be recorded the said deeds and other instruments of writing, each of the defendants herein named has unlawfully obtained for himself an apparent title or interest of record to the land hereinbefore described, all of which was done in defiance of said agency supervision and in open violation and contempt of the laws of the United States, to the great detriment, irreparable injury and loss of said Indians, and in direct interference with the supervision and control policy and duty of the Government of the United States in that behalf and in obstruction of the execution of the laws.

Sixth.

And your orator further shows that among said transactions were those hereinafter under this sixth heading set forth. In such setting forth some abbreviations are employed for convenience, among others, the usual land office short descriptions by parts of sections, the letters N, W, S, E, signifying north, south, east and west, and the figures 2 and 4, signifying half and quarter sections, all the lands being sections of townships determined by the Indian Meridian of longitude, the word surplus is used to signify allotment exclusive of homestead; one half or other fraction blood signifies that the person has such proportion of Indian blood of the tribe in which he is en-

rolled; the recording in books numbered 1, 2, 3, etc., or lettered, signifies recording in books of the recording district of Indian Territory, when the date of recording given is prior to November 16, 1907, and to books of the Register of Deeds of the—County of the State of Oklahoma when the date given is subsequent; the record of restriction division gives petitions for removal of restrictions and the action taken, or the fact that no action was taken.

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List No. 2.

(Cherokee County.)

Warranty Deed.

Rufus Miller, Muskogee, Oklahoma, and Nannie Miller, age 27 years, full-blood, Cherokee Roll No. 68, to John F. McClellan, Claremore, Oklahoma.

Description: SE/4 of NW/4 of SE/4, Section 10, Township 19 North, Range 23 East; 10 acres; surplus of Nannie Miller.

Consideration \$10.00.

Executed June 23, 1906.

Acknowledged June 23, 1906.

Recorded June 23, 1906, Book 7, page 353, at Tahlequah, Oklahoma.

Allotment certificate delivered June 30, 1906.

Allotment deed not recorded.

List No. 2.

Warranty Timber Deed.

Kahorkah Yaholah, Tahlequah, Oklahoma, age 11 years, full-blood, Cherokee Roll No. 29111, to International Land Company, Muskogee, Oklahoma.

W/2 SW/4 and S/2 SE/4 SW/4 Section 34, Twp. 14 North, Range 21 East; 100 acres.

Consideration \$1.00 and other valuable considerations.

Executed Aug. 23, 1907.

Ack. Aug. 23, 1907.

Recorded Aug. 23, 1907, Book 4, page 491, at Sallisaw, Oklahoma.

NOTE.—This conveyance grants, bargains and sells forever the timber upon the above described land, of the land above described, the NW/4 SW/4 Section 34, Twp. 14 North, Range 21 East, was allotted to Richard Bengé, Cherokee Roll No. 21059, as surplus, on October 5, 1904; and the balance is allotted to the grantor as surplus.

Allotment certificate No. 61867, issued to the grantor, delivered November 23, 1907. Allotment deed not recorded.

List No. 2.

Warranty Deed.

Jennie Long, Bunch, Oklahoma, age 61 years, full-blood, Cherokee Roll No. 2645, to James P. Allen, Post office omitted, Muskogee, Oklahoma.

Description: SW/4 NW/4, and SE/4 NW/4 NW/4 Section 16, Twp. 22 North, Range 13 East, 50 acres, surplus.

Consideration \$400.00.

Executed October 23, 1907.

Acknowledged October 23, 1907.

Recorded October 24, 1907, Book 21, page 446, at Tulsa, Oklahoma.

Allotment certificate No. 9802 delivered June 24, 1907.

Allotment deed recorded May 15, 1905.

List No. 2.

Washington County.

General Warranty Deed.

Bettie Catcher, Dutch Mills, Arkansas, age 29 years, full-blood, Cherokee Roll No. 27216, to Robert L. Owen, Muskogee, Oklahoma.

Description: All my surplus allotted lands except homestead, and particularly the SW/4 NW/4 NW/4 and E/2 NW/4 NW/4 Section 36, Twp. 28 North, Range 12 East.

Consideration \$450.00.

Executed November 19, 1904.

Acknowledged November 19, 1904.

Recorded November 21, 1904, Book E, page 162, at Nowata, Oklahoma.

Allotment certificate No. 56378 delivered Sept. 30, 1907.

Allotment deed recorded October 8, 1907.

List No. 2.

Washington County.

Warranty Deed.

John Hair, Melvin, Oklahoma, age 37 years, full-blood, Cherokee Roll No. 18244, to James P. Allen, Windsor, Missouri.

Description: SW/4 SW/4 NE/4; W/2 NW/4 SE/4 and NE/4 NE/4 SW/4 Section 32, Twp. 24, North, Range 13 East, 40 acres, surplus.

Consideration \$300.00.

Executed January 4, 1908.

Acknowledged January 4, 1908.

Recorded January 6, 1908, Book 1, page 5, at Bartlesville, Oklahoma.

Allotment certificate No. 59091 delivered February 28, 1907.

Allotment deed not recorded.

List No. 2.

Washington County.

Warranty Deed.

Wutie Shell (née Daugherty) Stilwell, Oklahoma, age 21 years, full-blood, Cherokee Roll No. 19224, and Richard Shell, her husband, to James P. Allen, Windsor, Missouri.

Description: SE/4 NE/4 SE/4 and SE/4 SE/4 less 3.04 acres for K. & O. C. R. R. Right-of-way, Section 5, Twp. 27 North, Range 13 East, 46.86 acres, surplus of Wutie Daugherty.

Consideration \$400.00.

Executed May 7, 1908.

Acknowledged May 7, 1908.

Recorded May 8, 1908, Book 1, page 394, at Bartlesville, Oklahoma.

Allotment certificate No. 65836 delivered August 20, 1907.

Allotment deed not recorded.

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List No. 2.

Washington County.

Warranty Deed.

Wutie Shell (enrolled as Daugherty) Stilwell, Oklahoma, age 21 years, full-blood, Cherokee Roll No. 19224, and Richard Shell, her husband, to Geo. E. Gilmore, Stilwell, Oklahoma.

Description: SE/4 SE/4, and SE/4 NE/4 SE/4 Section 5, Twp. 27 North, Range 13 East, 50 acres, Surplus of Wutie Daugherty.

Consideration \$750.00.

Executed August 15, 1907.

Acknowledged Aug. 15, 1907.

Recorded Aug. 17, 1907, Book M, page 475, at Bartlesville, Oklahoma.

Allotment certificate No. 65836 delivered August 20, 1907.

Allotment deed not recorded.

List No. 2.

Washington County.

Warranty Deed.

Wutie Shell, Stilwell, Oklahoma, age 21 years, full blood, Cherokee Roll No. 19224, and Richard Shell, her husband, to Geo. E. Gilmore, Stilwell, Oklahoma.

Description: All my surplus lands lying in Sec. 5, 27-13 E. & E/2 SE/4 Sec. 5.

Consideration \$750.00.

Executed July 24, 1907.

Acknowledged July 24, 1907.

Recorded Aug. 1, 1907, Book M, page 307, at Bartlesville, Oklahoma.

NOTE.—The surplus allotment of Wuttie Shell, née Daugherty, is described as the SE/4 SE/4 and SE/4 NE/4 SE/4 Section 5, Twp. 27 North, Range 13 East, 50 acres.

Allotment certificate No. 65836 delivered August 20, 1907.

Allotment deed not recorded.

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List No. 2.

(Adair County.)

Warranty Deed.

Gafford Sixkiller, Marble City, Oklahoma, age 33 years, full blood, Cherokee Roll No. 19245, to J. Warren Reed, Muskogee, Oklahoma.

Description: E/2 SW/4 SE/4 Section 24, Twp. 19 North, Range 25 East, 20 acres, surplus.

Consideration \$20.00.

Executed — —, 19—.

Acknowledged — —, 19—.

Recorded January 3, 1908, Book 1, page 72, at Westville, Oklahoma.

Allotment Certificate not issued.

Allotment deed not recorded.

List No. 2.

Delaware County.

Warranty Deed.

Joseph Daugherty, Vinita, Oklahoma, age 63 years, full blood, Cherokee Roll No. 27632, to C. B. Muropulos (post office omitted) Vinita, Oklahoma.

Description: NE/4 NE/4 NE/4, Section 24, Twp. 21 North, Range 22 East, 10 acres, surplus.

Consideration \$50.00.

Executed November 15, 1906.

Acknowledged November 15, 1906.

Recorded November 15, 1906, Book 1, page 436, at Pryor Creek, Oklahoma.

Allotment certificate No. 63490 delivered November 23, 1906.

Allotment deed recorded May 4, 1908.

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List No. 2.

(Delaware County.)

Warranty Deed.

John Hair, Tahlequah, Oklahoma, age 37 years, full-blood, Cherokee Roll No. 18244, to Fred W. Davis, Muskogee, Oklahoma.

Description: N/2 NE/4 SW/4; SW/4 NE/4 SW/4 Section 27; W/2 SE/4 NE/4; NE/4 NW/4 SE/4 Section 28; NE/4 SW/4 NE/4; SW/4 SW/4 NE/4 Section 36; Twp. 22 North, Range 22 East; SW/4 SE/4 SE/4 Section 19 Twp. 23 North, Range 22 East; 90 acres, surplus.

Consideration \$200.00.

Executed August 13, 1907.

Acknowledged Aug. 13, 1907.

Recorded Aug. 13, 1907, Book Q, at page 114, at Pryor Creek, Oklahoma.

Allotment certificates Nos. 66799, 66800 and 66801 delivered May 4, 1908.

Allotment deed not recorded.

List No. 2.

Craig County.

Warranty Deed.

Clawyasta Barnoskie, Braggs, Oklahoma, age 42 years, full blood, Cherokee Roll No. 25921, to The Continental Land & Trust Company, Muskogee, Oklahoma.

Description: Lots 3 and 4, Section 14, Twp. 26 North, Range 18. East, 79.68 acres, surplus.

Consideration \$200.00.

Executed August 15, 1907.

Acknowledged August 15, 1907.

Recorded August 15, 1907, Book 8, page 554, at Tahlequah, Oklahoma.

Allotment certificate delivered August 15, 1907.

Allotment deed not recorded.

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List No. 2.

Nowata County.

General Warranty Deed.

Jack Yaholah, Braggs, Oklahoma, age 28 years, full-blood, Cherokee Roll No. 20829, to P. E. Heckman, Muskogee, Oklahoma.

Description: NW/4 NE/4 and SW/4 NE/4 NE/4 Section 7, Twp. 28 North, Range 17 East, 50 acres, surplus.

Consideration \$250.00.

Executed August 30, 1907.

Acknowledged August 30, 1907.

Recorded August 31, 1907, Book V, page 291, at Nowata, Oklahoma.

Allotment certificate delivered July 22, 1907.

Allotment deed not recorded.

List No. 2.

Rogers County.

Warranty Deed.

Taylor Prince, Muskogee, Oklahoma, age 45 years, full blood, Cherokee Roll No. 21188, to J. P. Allen, Muskogee, Oklahoma.

Description: SW/4 NW/4, W/2 SE/4 NW/4; W/2 SW/4 NW/4 Section 32, Twp. 22 North, Range 15 East, 80 acres; surplus.

Consideration \$300.00.

Executed October 5, 1907.

Acknowledged October 5, 1907.

Recorded October 7, 1907, Book 31, page 266, at Claremore, Oklahoma.

Allotment certificate No. 61148 delivered April 30, 1906.

Allotment deed not recorded.

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Seventh.

Your orator further shows that it is informed, and verily believes, and therefore charges the fact to be, that the defendants herein named and each of them has heretofore unlawfully secured from the members of said Cherokee tribe of Indians other unlawful deeds, conveyances, mortgages, powers of attorney and contracts for and about their said allotments, which the said Indians and freedmen had no authority to sell, alienate, dispose of, contract about or incumber in any manner, as aforesaid, but that for the reason that such deeds, conveyances, mortgages, powers of attorney and contracts for and about their allotments have not been recorded by the

said defendants, your orator is unable to give a minute and correct description of the same without the discovery from the defendants hereinafter in this bill prayed; and that the said defendants herein named are continuing to induce the members of the said Cherokee tribe of Indians named in this bill and other members of said tribe, to make, execute and deliver to them, the said defendants, and to take and accept from the said Cherokee Indians, deeds, conveyances, mortgages, powers of attorney, and contracts for and about their allotments, and threaten, announce, publish and declare that they will continue such unlawful acts and doings. And your orator is informed and believes and so avers that said documents, and in many cases, possession of the lands are being and are about to be obtained by said defendants for wholly improper purposes and in fraud of said Cherokees. And your orator further shows and avers that the defendants will so continue their unlawful acts and doings, and that their conduct as specifically alleged in paragraphs five and six hereof has, and their present and future conduct as in this paragraph alleged, will, if continued, greatly harass your orator in the discharge of its duty to and in the administration of its policy in relation to said Indians, and compel it to bring many suits in order to annul and set aside the said deeds, conveyances, powers of attorney, leases, and contracts for and about the said lands; which the defendants have taken, are taking and still continue to take, as herein alleged; And said defendants have been and are taking possession of many of said tracts, as your orator is informed and believes, but your orator cannot, within the limited time deemed best for the filing of this bill, ascertain clearly, and set forth the facts with regard to the possession of particular tracts.

Eighth.

And your orator further shows that, in addition to the instruments of writing hereinbefore mentioned and specified, upward of four thousand instruments of writing, of a nature similar to those hereinbefore set forth, purporting to convey or to encumber or to affect the title of lands located within the Eastern District of Oklahoma and duly allotted to members of the Five Civilized Tribes or belonging to said tribes, have been executed and placed on record by the defendants herein and other persons and corporations in contravention of the treaties entered into between your orator and the said several Indian tribes and the laws of the United States, and your orator shows that unless it shall be permitted to join in its bills numerous defendants, against each of whom your orator has a like cause of action, and against each of whom your orator seeks the same relief, and whose pretended claims are based upon similar facts and involve precisely the same questions of law, your orator will be driven to the necessity of bringing a great number of distinct and separate suits, and that it will be practically impossible for your orator to prosecute, and for the courts to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time.

Your orator further shows that under and by reason of the aforesaid treaties and Acts of Congress, all of the deeds and other instruments of writing hereinafter mentioned constitute a damage to the titles of the said members of the said tribes, thereby greatly deteriorating the value of the interest of the said tribes in their lands, and that defendants are interfering with the possession and rights of the said tribes in their said lands, and are seriously retarding the control and supervision of the government over them, and are producing irreparable injury to your orator and the said tribes and members of the said tribes. And your orator further shows that by reason of the duties, obligations and rights of the government, as set forth in this bill, the government is charged with the duty of protecting in the courts the rights of the said tribes and members thereof, and in that behalf is charged with a trust of a high and delicate character, and that in the performance of these obligations and trust duties it is necessary to seek the aid of this court to the end that the defendants herein named should not only be ousted from the possession of the said lands, but that the court should order the said several deeds and instruments of writing herein specified and described to be surrendered and delivered up for cancellation and the record purged of the same; that the court should order the defendants to discover all facts relating to their possession of said lands, and to set forth all deeds, conveyances, mortgages, powers of attorney, and contracts in their possession other than those particularly mentioned and described in this bill, in order that the same may be cancelled.

Tenth.

Your orator further shows that it has joined in this bill of complaint numerous defendants for the purpose of avoiding a multiplicity of suits to recover the possession of the said lands for the benefit of the said tribes and members thereof and for the purpose of avoiding a multiplicity of suits to enjoin each of the several defendants herein from continuing to occupy the said lands and from taking any further deeds or other instruments of writing purporting to convey the title to said lands, and a multiplicity of suits to have the deeds and instruments of writing which they have induced the said members to make, ordered surrendered and delivered up for cancellation and the record purged thereof; that the interest of your orator as guardian and trustee for the Indians as *parens patriæ* is identical in all cases, and that the right of your orator for relief against said several defendants is identically the same as against each, and the remedy against the said defendants hereinafter prayed for is precisely the same against each.

Forasmuch, therefore, as your orator is remediless in the premises at and by the strict rule of the common law and is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable, and to the end that your orator may have that relief which it can only obtain in a court of equity and that each of the

defendants herein named may answer the premises, the benefit whereof is expressly waived by your orator, your orator prays:

First. That this honorable court by its decree shall adjudge and declare the said several leases, deeds, instruments of conveyance and incumbrances described in paragraph numbered six of this bill, to be void and of no effect as instruments of conveyance.

15 and that the same be cancelled and annulled and altogether held for naught, and that the title to the lands therein described be held and decreed to be in the allottees, or their heirs, subject to the terms, conditions and limitations contained in the treaties, agreements and laws of the United States.

Second. That the defendants in this bill named shall be required to make a full and true discovery and disclosure of all possessions, claims to possession, deeds, conveyances, mortgages, powers of attorney, contracts and other instruments of writing in the possession or control of the said defendants, or which may have been made, providing for the sale and incumbrance or in any manner contracting for or charging or binding or attempting so to contract for, charge or bind the lands allotted to any of the Cherokee tribe of Indians or unallotted lands of the tribe, setting forth a list or schedule showing as to such deeds, conveyances, mortgages, powers of attorney, contracts, or other instruments of writing, the full names of all the parties thereto, the dates thereof, and a correct description of the land therein attempted to be conveyed, mortgaged or contracted about, and that each of the said defendants shall be required to surrender and deliver up to this honorable court all such deeds, conveyances, mortgages, powers of attorney, contracts and other instruments of writing so discovered and disclosed by them, and that this honorable court shall, by its decree, declare the same to be void and of no effect, and that the same shall be cancelled and annulled and altogether held for naught, and the title to the lands therein mentioned and described be held and decreed to be in the tribes and members thereof to whom they were allotted under the provisions of the said act of July 1, 1902, or any other act, subject to the treaties, agreements and laws of the United States; that all rights of and to possession shall be declared to be in said Indians and that all defendants in possession or claiming possession be ordered to vacate or cease making such claims; and that your orator may have such other and further relief in the premises as the nature and circumstances of this case may require and as may be agreeable to equity and good conscience.

Third. That subpoenas and all proper process issue, making each and every one of the following named persons parties to said bill, and requiring each of them to appear upon a certain day and place to be fixed by this honorable court, and answer fully the exigencies of this bill, but not under oath, which is hereby expressly waived.

16 John F. McClellan, Thomas J. Watts, International Land Company, James P. Allen, Robert L. Owen, Geo. E. Gilmore,

J. Warren Reed, C. B. Muropulos, Fred W. Davis, The Continental Land & Trust Company, P. E. Heckman, S. A. McSpadden.

CHARLES J. BONAPARTE,
Attorney General,

By CHARLES W. RUSSELL,
Ass't Att'y Gen'l.

WM. J. GREGG,
United States Attorney,

By HARLOW A. LEEKLEY,
Ass't U. S. Att'y.

CHARLES W. RUSSELL,
U. S. Assistant Attorney-General, of Counsel.

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

On this 29th day of July, 1908, personally appeared before me, Clerk of the Circuit Court of the United States within and for said District, Harlow A. Leekley, who being first duly sworn deposed and says that he is an Assistant United States Attorney for the Eastern District of Oklahoma; that he has read the foregoing bill by him subscribed, and knows the contents thereof, and that the matters therein stated upon knowledge he knows to be true, and those upon belief he believes to be true.

HARLOW A. LEEKLEY.

Subscribed and sworn to before me, this the 29th day of July, 1908.

[SEAL.]

L. G. DISNEY, *Clerk.*

Endorsed as follows: No. 429. In the United States, Circuit Court, Eastern District of Okla. The United States vs. Jas. F. McClellan, et al. Bill. Filed Aug. 1, 1908. L. G. Disney, Clerk by Florence Hammersley, D. C. Wm. J. Gregg, U. S. Atty. Charles W. Russell of Counsel.

And thereafter, on the dates as shown by the endorsements thereon, demurrers to the Bill of Complaint were filed, of which the following are copies:

No. 1.

In the Circuit Court of the United States, Eastern District of Oklahoma, at Muskogee.

No. 429.

UNITED STATES, Plaintiff,

vs.

JOHN F. McCLELLON et al., Defendants.

Supplemental Demurrer of Defendant P. E. Heckman to the Bill of Complaint of Plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said Bill of Complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill.

And for cause of demurrer says:

(1) That this court has no jurisdiction in the premises, the alleged controversy, if any, being between citizens of Oklahoma, exclusively and not Indians under the laws of the United States, and members of the late Five Civilized Tribes, no longer comprising an Indian Tribe within the meaning of the Constitution and laws of the United States.

(2) That the equity courts of the state of Oklahoma are entitled to the jurisdiction and not the United States Circuit Court.

(3) That the United States is not the guardian of the citizens of the state of Oklahoma, who were formerly members of the late Five Civilized Tribes.

(4) That Complainant has no interest in the alleged controversy.

(5) That complainant's bill is brought on behalf of vendors who confessedly sold defendant property which violates the equity rule which requires a Complainant to come into court with clean hands.

(6) That Bill of Complaint does not state facts sufficient to constitute a cause of action against this defendant.

(7) Complainant's bill is brought on the theories and conclusions of law not well founded.

(8) There is misjoinder of causes of action in Complainant's bill.

(9) There is misjoinder of parties in Complainant's bill.

18-20 (10) Complainant's bill is multifarious.

(Signed)

ENLOE V. VERNON.

Attorney for Defendant.

STATE OF OKLAHOMA,

Muskogee County:

P. E. Heckman being first duly sworn, deposes and says that he is the defendant in the above entitled and numbered cause and that the above demurrer is not interposed for delay and hinderance but that justice may be done.

(Signed)

P. E. HECKMAN.

Subscribed and sworn to before me this the 3rd day of Oct., 1908.
My Commission expires Aug. 31, 1911.

(Signed)

W. V. BOWMAN,
Notary Public.

[SEAL.]

STATE OF OKLAHOMA,

Muskogee County:

Enloe V. Vernon being first duly sworn, deposes and says that he is attorney in the above entitled cause for defendant, and above demurrer is not interposed for delay, but founded on conclusions of law.

(Signed)

ENLOE V. VERNON.

Subscribed and sworn to before me this the 3rd day of Oct., 1908.

[SEAL.]

M. V. BOWMAN,
Notary Public.

My Commission expires Aug. 31, 1911.

Endorsed as follows: No. 429. United States Plaintiff, vs. John F. McClellon, Def't. Supplemental Demurrer of Defendant P. E. Heckman. Filed Oct. 3, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla. Enloe V. Vernon, Att'y.

* * * * *

21

No. 3.

Demurrer.

In the Circuit Court of the United States for the Eastern District of Oklahoma.

No. 429. In Equity.

UNITED STATES OF AMERICA, Complainant,
vs.

J. F. McCLELLAN et al.

The Demurrer of Robert L. Owen, One of the Defendants in the Above-entitled Cause, to the Bill of Complaint of the United States of America, Complainant.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Oklahoma:

The defendant by protestation and not confessing or acknowledging all or any of the matters and things in the said Complainant's Bill of Complaint to be true in such manner and form as therein set forth and alleged, enters this his demurrer against the bill of the complainant upon the following grounds:

1st. That this honorable court has no jurisdiction in the premises, the alleged controversy, if any, being between citizens of Oklahoma,

exclusively, not Indians under the laws of the United States, and members of the late Five Civilized Tribes no longer comprising an Indian Tribe within the meaning of the constitution and the laws of the United States.

2nd. The bill does not present a cause for equitable jurisdiction, there being a remedy at law in the State courts of Oklahoma.

3rd. If it were an equity case the United States Circuit Court is not the Court to hear the controversy, but the equity courts of the State of Oklahoma are entitled to jurisdiction.

4th. Complainant's bill is brought on the theory that the United States is guardian of the citizens of Oklahoma who were formerly members of the late Five Civilized Tribes, a conclusion of law not well founded.

5th. Complainant's bill is based on the theory that the citizens of Oklahoma, on whose behalf the bill is brought, are wards of the United States, a conclusion of law not well founded.

6th. On the theory of complainant that members of the Five Civilized Tribes are wards and not sui Juris this defendant would
22 be incompetent to be a defendant, defending his own interests, but the complainant would be charged with defending this defendant.

7th. The complainant either as guardian or sovereign has no function to justify the bringing of such suit.

8th. There is a misjoinder of causes of action in the complainant's bill.

9th. There is a misjoinder of parties in the complainant's bill.

10th. The complainant's bill is multifarious.

11th. The complainant has no interest in the alleged controversy.

12th. The defendant is not answerable to the complainant.

13th. Complainant is not entitled to the equitable relief sought for, it appearing on the records of the United States in the present proceedings that this defendant paid or contracted to pay and is ready to pay the various vendors two and one-half ($2\frac{1}{2}$) times the value of the land as fixed by the Interior Department, at whose express instance this suit was confessedly brought.

14th. The complainant's bill on behalf of the alleged vendors violates the equity rule, which requires a complainant in equity to come into the court with clean hands. The vendor in this proceeding confessedly having sold to the defendant property when he is alleged by this proceeding to have known that such sale was fraudulent and in violation of law.

15th. The subject matter in no one of these numerous cases massed together in this bill is of sufficient value to give jurisdiction to the Court under the statute.

16th. This proceeding is brought in open disregard of the requirements of the United States Statute authorizing such suits which imposes the injunction that the United States may bring an action "at the request of any allottee" believing himself aggrieved.

17th. This suit is brought in open disregard of the requirements of the statute which by necessary implication requires the proceedings to be brought in the Courts of the State of Oklahoma.

18th. Complainant's bill is inequitable in suggesting a fraud by this defendant without specifying the wrong complained of.
23 when the records of the complainant and of the complainant's bill exhibit the fact that this defendant contracted to pay two and a half ($2\frac{1}{2}$) times the value fixed by the complainant itself as the fair value of the property under the statute directing such valuation to be made.

Defendant therefore prays the dismissal and setting aside of the Bill of the Complainant on the grounds set out in defendant's demurrer severally considered and determined.

(Signed)

ROBERT L. OWEN,
Solicitor for Robert L. Owen.

Endorsed as follows: U. S. of America, Complainant, vs. J. F. McClellan, et al. Equity No. 429. Demurrer of R. L. Owen. Filed Aug. 8, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla. Page 13.

(d.)

Hearing.

And thereafterwards, on the 22nd, 23rd, and 24th days of March, 1909, at the Court House at Muskogee, being days of the regular March term, present and presiding Honorable Ralph E. Campbell, said demurrers were then and there argued by counsel for the defendants and for the complainant, after which, said cause was taken under advisement by the court.

(e.)

Opinion.

And thereafter, on the sixth day of August, 1909, it being a day of the regular McAlester term, at the Court House at Muskogee, after Court being opened in due form as of the McAlester sitting, present and presiding Honorable Ralph E. Campbell, Judge, the following opinion was read:

In the United States Circuit Court for the Eastern District of
Oklahoma.

No. 284. In Equity.

THE UNITED STATES OF AMERICA, Complainant,

vs.

JAMES P. ALLEN et al., Respondents,

And Similar Cases.

Opinion.

The United States as complainants have filed in this court numerous bills, in each of which many individuals are made defendants. Each bill has relation to lands of one of the five Civilized Tribes. In the first paragraph of each bill, it is alleged that pursuant to the terms of certain treaties entered into between the United States and the tribe referred to, the United States granted by patent to each tribe certain lands in the Indian Territory, now the Eastern District of Oklahoma, and that by the terms of said treaties and the laws of the United States, the United States solemnly obligated themselves to secure and protect such tribe of Indians and the members thereof in the possession, use and enjoyment of and the title to said lands, and that, according to the terms of said treaties and of said acts of Congress relating thereto, and of the patent to said lands, the said tribe of Indians and every member thereof, have at all times and are now without power to dispose of any part of said lands or of any interest therein without the consent and authority of the United States or otherwise than in the manner prescribed by the United States.

It is alleged that by reason of the helpless and dependent character of such Indians tribe and the several members thereof, the United States as the guardian have exclusive dominion over and control of the property of said tribe and the several members thereof by virtue of which there is imposed upon the United States the duty
24 to do whatever necessary for the guidance, welfare and protection of such Indians; that said tribe has always been and is now recognized, treated, and dealt with as a tribe of Indians by the United States, under the care of an Indian Agent; that Congress still appropriates large sums of money for the benefit and protection of said tribe and the individual members thereof, and for school purposes; that the United States still have in their possession a large sum of money belonging to said tribe, and that there still remains unallotted a large body of land, the common property of such tribe.

Reference is then made to the act or acts of Congress under which the lands of such tribe have been allotted to the individual members thereof, subject to the various restrictions against the alienation thereby imposed. Paragraph IV of the bill then sets forth the character of the land involved at the date of the convey-

ance sought to be cancelled, as to whether allotted or tribal. For convenience, the bills may be classified as follows:

Cherokee Nation.

No. 1. All cases of conveyance by allottees to defendants where restrictions will be removed July 27, 1908.

No. 2. All cases of land not allotted at the time of conveyance complained of, but sold by a person claiming a right to be enrolled, and later denied citizenship.

No. 3. Sales, without the approval of the Secretary, of lands inherited by full blood heirs. Before April 26, 1906.

No. 4. Same as above, after April 26, 1906.

No. 5. Homestead of freedmen.

No. 6. Conveyance by other than allottee covering land allotted at date of conveyance.

No. 7. Conveyance by other than allottee covering lands which were tribal at date of conveyance.

No. 8. Homesteads of Intermarried Whites.

No. 9. Mixed bloods. Homesteads of $\frac{1}{2}$ bloods and more, and surplus of $\frac{3}{4}$ blood and more.

No. 10. Full bloods, prior to April 26, 1906.

No. 11. Full bloods, after April 26, 1906.

In the Creek Nation the bills may be classified the same as above, except that there is no bill No. 8. In the Choctaw and Chickasaw Nations the bills may be classified as above. In addition, there is, as to these nations, a bill covering Choctaw and Chickasaw lands sold prior to the removal of restrictions under the Act of July 1, 1908. As to the Seminole Nation, the bills may be classified as follows:

Conveyances by freedmen after allotment and before issuance of patent;

Conveyances by full blood heirs; before issuance of patent.

Conveyances by mixed bloods before the issuance of patent.

Conveyances by other than allottees.

Conveyances by adopted citizens before issuance of patent.

Conveyance by full bloods.

25 It is to be noted that all the bills involve lands which had been allotted at the time of the conveyance complained of, except Nos. 2 and 7. None of the bills applying to the Seminole Nation involve unallotted lands. In class No. 2 it is alleged that the tracts of land involved comprise lands of the tribe which had never been allotted at the time of the execution and delivery and recording of the conveyances sought to be cancelled, but were then tribal lands, and that no individual, at that time, nor ever has had any separate ownership thereof, or right to transfer or incumber the same. In class No. 7 it is alleged that, at the date of the conveyance sought to be cancelled, the lands were tribal lands, but it is not alleged that they are still tribal and unallotted. Paragraph 5 of the bill then proceeds substantially as follows:

"Your orator further shows that each of the deeds, mortgages, leases, contracts of sale, powers of attorney and other evidence of title

or incumbrance upon tracts of land as hereinafter set forth, was secured by defendants in *defiant*, wilful, and open violation of law, and the duty which rested upon this nation and every member thereof, and for the purpose of unlawfully incumbering said lands allotted to members of the said Seminole tribe of Indians, all of whom, under the treaties and laws of the United States, were without power or authority to sell, alienate, or incumber said lands in any manner whatsoever, and your orator further shows that by filing for record and causing to be recorded the said deeds and other instruments of writing, each of the defendants herein named has unlawfully obtained for himself an apparent title or interest of record to the land hereinbefore described, all of which was done in defiance of said agency supervision and in open violation and contempt of the laws of the United States, to the great detriment, irreparable injury and loss of said Indians, and in direct interference with the supervision and control, policy and duty of the Government of the United States in that behalf, and in obstruction of the execution of the laws."

Paragraph 6 then sets forth in detail the various conveyances sought to be cancelled, involving numerous separate and distinct tracts of land in each of which conveyances, in most instances, the individual allottee or those claiming through him, appear as grantors, and one or more of the defendants appear as grantees.

Paragraph 7 alleges upon information and belief that the defendants have secured, or are proceeding to secure, other unlawful conveyances not now recorded, a minute description of which
26 the pleader alleges cannot be given without the discovery prayed for, and that the defendants are continuing to induce the members of the tribe to execute and deliver to them such conveyances, etc., and in many instances are taking possession of the lands covered by such conveyances for wholly improper purposes, and in fraud of the said tribe. The bill then proceeds:

"And your orator further shows and avers that the defendants will so continue their unlawful acts and doings and that their conduct as specifically alleged in paragraphs 5 and 6 hereof, as all their present and future conduct, as in this paragraph alleged, will, if continued, greatly harass your orator in the discharge of its duty to and in the administration of its policy in relation to said Indians, and compel it to bring many suits in order to annul and set aside the said deeds, conveyances, mortgages, powers of attorney, leases, and contracts for and about the said lands, which the defendants have taken, are taking, and will continue to take as herein alleged."

The bill then proceeds specifically as follows:

Eighth.

"And your orator further shows that, in addition to the instrument of writing hereinbefore mentioned and specified, upward of four thousand other instruments of writing, of a nature similar to those hereinbefore set forth, purporting to convey or to encumber or to affect the title of lands located within the Eastern Judicial District of Oklahoma, and only allotted to members of the Five Civilized

Tribes, or belonging to said tribes, have been executed and placed on record by the defendants herein and other persons and corporations, in contravention of the treaties entered into between your orator and the said several Indian tribes and the laws of the United States, and your orator shows that unless it shall be permitted to join in its bill of numerous defendants, against each of whom your orator has a like cause of action, and against each of whom your orator seeks the same relief, and whose pretended claims are based upon similar facts and involve precisely the same questions of law, your orator will be driven to the necessity of bringing a great number of separate and distinct suits, and that it will be practically impossible for your orator to prosecute and for the court to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time."

Ninth.

27 "Your orator further shows that under and by virtue of the afore-said treaties and acts of Congress, all of the deeds and other instruments of writing hereinafter mentioned constitute a damage to the titles of the said members of the said tribes, thereby greatly deteriorating the value of the interests of the said tribes and members of said tribes in their lands, and that defendants are interfering with the possession and rights of the said tribes and members of the said tribes in their said lands, and are seriously retarding the control and supervision of the Government over them, and are producing irreparable injury to your orator and the said tribes and members of said tribes. And your orator further shows that by reason of the duties, obligations, and rights of the Government, as set forth in this bill, the Government is charged with the duty of protecting in the courts the rights of the said tribes and members thereof, and in that behalf is charged with a trust of a high and delicate character, and that in the performance of these obligations and trust duties it is necessary to seek the aid of this court to the end that the defendants herein named should not only be ousted from the possession of the said lands, but that the court should order the said several deeds and instruments of writing herein specified and described to be surrendered and delivered up for cancellation, and the record purged of the same; that the court should order the defendants to discover all facts relating to their possession of said lands, and to set forth all deeds, conveyances, mortgages, powers of attorney, and contracts in their possession, other than those particularly mentioned and described in this bill, in order that the same may be cancelled.

Tenth.

"Your orator further shows that it has joined in this bill of complaint numerous defendants for the purpose of avoiding a multiplicity of suits to recover the possession of the said lands for the benefit of the said tribes and members thereof, and for the purpose of avoiding a multiplicity of suits to enjoin each of the several defendants herein from continuing to occupy the said lands and from taking any further deeds or other instruments of writing purporting to convey

the title to said lands, and a multiplicity of suits to have the deeds and instruments of writing which they have induced the said members to make, ordered surrendered and delivered up for cancellation and the record purged thereof; that the interest of your orator, as guardian and trustee for the Indians and as *parens patriæ*, is identical in all cases, and that the right of your orator for relief against the said several defendants is identically the same as against each, and the remedy against each of the said defendants hereinafter prayed for is precisely the same as against each. For as much, therefore,

28 as your orator is remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable, and to the end that your orator may have that relief which it can only obtain in a court of equity, and that each of the defendants herein named may answer the premises, the benefit whereof is expressly waived by your orator, your orator prays: * * *

The prayer of each bill is, first, that the conveyances set forth in paragraph six shall be decreed to be void and of no effect as instruments of conveyance and shall be cancelled, and that the title to the lands therein described be held and decreed to be in the allottee or their heirs, subject to the terms, conditions, and limitations contained in the treaties, agreements, and laws of the United States. It is further prayed that the defendants shall be required to make discovery and disclosure of all other possessions, claims to possession, deeds, conveyances, mortgages, powers of attorney, contracts and other instruments of writing, setting forth a list or schedule thereof in their possession, conveying the lands allotted to any of the members of the said tribe, or unallotted lands of the said tribe; and that the defendants be required to surrender and deliver up to the court all such deeds, etc.; and that the same be cancelled, and such lands decreed to be in the tribe or members thereof to whom they have been allotted; and that all defendants in possession or claiming possession thereof be ordered to vacate or cease making such claim; and then follows the usual prayer for subpoena.

Many of the defendants filed demurrers to these bills, and a date was set by the court for hearing arguments thereon, and all such demurrers were presented at the same time, fully argued by counsel, and thereupon submitted to the court. The demurrers set up many grounds, the main ones of which are in substance as follows: That the court is without jurisdiction; that the bill of complaint fails to show any such interest in the plaintiff as would entitle it to maintain these suits; because the plaintiff has no capacity to maintain these suits; because the bill of complaint is wholly devoid of equity; because by said bill it is sought to quiet title to land of which the plaintiff is not now and has never been in possession; because there is a defect of parties to these suits; because there is a misjoinder of alleged causes of action in this: That the alleged cause of action against each defendant is improperly joined with that of numerous other defendants when there is no joint interest as between the defendants

29 or any joint occupation of the property or any reason that would authorize the joint suit alleged because the bills are

multifarious; because the bills do not disclose such a state of facts as entitle plaintiff to recover in any event.

While a few of the bills filed relate to transactions alleged to have taken place prior to allotment of the lands involved, it appears that such lands have since been allotted, and we have now to consider only lands of the Five Civilized Tribes allotted to citizens thereof.

The contention that the Court has no jurisdiction is unsound, if the United States are properly parties plaintiff, because wherever the United States appear as parties plaintiff or petitioners, the Circuit Court of the United States has jurisdiction. Constitution, Art. 3, Sec. 2, Clause 1. Act of Congress of '87-8, 25 Stat. at Large, 433.

The question of the capacity of the United States to sue involves the question as to whether they have such an interest in the controversy as will entitle them to maintain the suits, for unless they have such interest, either by way of title in the land, or duty or obligation in relation to the allottees and the lands involved, the demurrers on this point must be sustained. In *United States vs. San Jacinto Tin Co.*, 125 U. S. 273, a suit to annul and set aside a patent, the court says:

"But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of these other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States, and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if

there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

Has the government any interest, by way of ownership of or title to these allotted lands? They were originally granted by patent to the respective tribes, to be owned and held by them while their tribal relations should exist, or until they should abandon the same. The treaty with the Choctaws provided that the land should be granted to them "in fee simple to them and their descendants, to enure to them while they should exist as a nation and live on it." (Kappler, p. 311, 7 Stat. 333) This same title was vested in the Chickasaws, (Kappler 11 Stat. 573) By treaty with the Cherokees (7 Stat. 478), it was agreed that the lands ceded to them should be conveyed to them by patent, according to the provisions of the act of May 28, 1830, above referred to, and patent was issued accordingly. By treaty with the Creeks, it was provided that the lands assigned them

should be granted by patent in fee simple, and that the right thereby granted should be continued to said tribe so long as they should exist as a nation and continue to occupy the same. (7 Stat. 417). By treaty of 1866 (14 Stat. 755), the United States granted and sold to the Seminole Nation the major part of if not all of the land now allotted to them, for the sum of fifty cents per acre, a total sum of a hundred thousand dollars. This appears to have been an unconditional grant. The above land so, granted to the several tribes was occupied by them in their tribal capacity until the allotment of these lands in severalty to the individual members, with the consent of the government, so that the tribal extinction or abandonment contemplated in the treaties is no longer to be considered. Since the utmost interest by way of title which it can possibly be contended remained in the government was the possibility of its reverting upon such tribal extinction or abandonment, it follows that no vestige of title to these lands now remains in the United States. These lands are now allotted lands for which allotment certificates have been issued, followed, in many instances, by patent, so that the equitable title at least has passed to the individual allottees. (Wallace vs. Adam, 143 Fed. 716).

Under the general allotment act, where the title passes direct from the government to the allottee, the issuance of patent passes title to the allottee in fee simple, and under no circumstances does it revert to the United States. Schrimpsheer vs. Stockton, 183 U. S. 290.

There is less reason why it should revert here.

31 It follows that the complainant can claim no such interest by way of title to these lands as would entitle it to maintain these suits.

In the act of Congress approved May 27, 1908, relative to the removal of restrictions is found the following provision:

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same in cases where deeds, leases or contracts or any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act."

It is contended that this provision confers upon complainant authority to institute and maintain these suits in the name of the United States. The dominant purpose of this provision seems to be to preclude any such construction of the act as would deny the United States the right to bring such suits referred to, rather than to confer such right. The bill, as originally introduced, did not contain this provision. On February 10, 1908, at the same session, a bill was introduced by Mr. Sherman, in the House, and Senator Clapp, in the Senate, specifically conferring upon the Attorney General the right

to bring such suits in the name of the United States, "for the use and benefit and on behalf of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes, or any enrolled member of either thereof". This bill covers over six pages, providing in detail for the conduct of such suits, and also providing for the transfer from the state to the federal courts of such suits in which the United States may become a party, as provided in the bill. This bill did not become a law. After its introduction and while the committee on Indian Affairs was considering the act of May 27, 1908, the Assistant Attorney General, for the Interior Department, appeared before the committee (Report of Committee on Indian Affairs for March 20, 1908), stating that the Department was in favor of the bill under consideration, but calling attention to the jurisdictional bill above referred to, saying that "the Department believes that some provision for jurisdiction should be passed with the other bill, for these reasons, briefly, that if it is not necessary, it could do no damage." He then referred to a

32 number of cases arising in the state courts, wherein he deemed it advisable that provision be made for removal to the federal court. He said "the Department feels that if the restrictions bill should be passed separately that there would be no possible chance, perhaps, to enact this other bill, because the term is approaching its end, and it is very difficult to get legislation when there is any direct active opposition to it. That being the history of such efforts it is the feeling of the Department that the two should be passed together."

Then followed a lengthy discussion between the representatives of the Department and members of the committee, relative to incorporating such jurisdictional provisions. It was conceded that without such provision, the existence of the authority and jurisdiction was not without question, the Assistant Attorney General insisting, however, that it already existed. Three of the Oklahoma representatives on the committee opposed the incorporation of a measure granting additional jurisdiction, insisting that only such powers and jurisdiction as already existed by virtue of the enabling act and other legislation should be exercised by the federal government, and conceded that if they existed, their exercise was proper. Finally the paragraph now being considered was incorporated.

The jurisdiction bill which failed was one positively and specifically conferring the authority and jurisdiction as if they had not theretofore existed. This provision is negative in its terms, not purporting to confer the right, but disavowing any intention to deny the same. Therefore, it can hardly be said that these eleven lines were incorporated in this bill in lieu of the jurisdiction bill containing over six pages.

In view of this legislative history, it is my opinion that it was only intended by this paragraph to provide that if by existing legislation the United States had authority to institute and maintain such suits, it was not the desire nor the intention of Congress for this act to deny it, and it should not be so construed. It is urged that the appropriation of money for such suit is a legislative recognition of their validity. In my judgment, it cannot be so construed in this case. It is the expressed purpose of Congress not to deny the right if it existed.

A refusal to provide money for the conduct of such suits would have prevented their institution and maintenance, resulting the same as a denial of the right. Hence the appropriation. The authority of the complainant to maintain these suits, if it exists, must be found elsewhere.

33 In the recent opinion of this court, overruling the demurrers in the town lot cases, the history of these Indians was thus reviewed:

"In the early part of the last century the Creek, Cherokee, Chickasaw, Choctaw, and Seminole tribes of Indians, known as the Five Civilized Tribes, occupied in their tribal capacity various portions of the states east of the Mississippi River. The growth and development in these then new states had caused the conflict between the advancing civilization of the white man and the habits and customs of these tribes to become more marked. The Indians as a rule were not then sufficiently advanced toward the civilization of their white neighbors to adapt themselves to the new order of things, and to merge these tribes into the body politic of the state was found to be impracticable. It was therefore apparent to Congress that some disposition of these Indians must be made. The plan of giving them in exchange for their lands east of the Mississippi, portions of the public domain west of the Mississippi, where, as it then appeared, they would be undisturbed by the encroachment of white men for years to come, was finally devised, and on May 28, 1830, an act of Congress was passed (4th Stats. at Large 411) providing that the President might cause the country west of the Mississippi, not within any state or organized territory and to which the Indian title had been extinguished, to be divided up into districts for the reception of such tribes or nations of Indians who might choose to exchange lands then occupied by them for such districts and remove thereto. This act contained the following provisions:

'SEC. 3. And be it further enacted, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided, always, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same.' "

Referring to the above act of Congress, it was said by Mr. Justice Davis, in the *Kansas Indians*, 5 Wallace 737,

"The well defined policy of the Government demanded the removal of the Indians from organized states, and it was supposed at the time the country selected for them was so remote as never to be needed for settlement, etc."

34 The Senate Committee, whose report is quoted in *Stevens vs. Cherokee Nation*, 174 U. S. 448, took occasion to say, with reference to the Five Civilized Tribes:

"This section of country was set apart to the Indian with the avowed purpose of maintaining an Indian community beyond and

away from the influence of white people. We stipulated that they should have unrestricted self-government and full jurisdiction over persons and property within their respective limits, and that we would protect them against intrusion of white people, and that we would not incorporate them in a political organization without their consent. Every treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of the Indians from the whites, and non-participation by the whites in their political and industrial affairs. We made it possible for the Indians of that section of country to maintain their tribal relations and their Indian polity, laws and civilization if they wished so to do. And, if now, the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a population of strangers five times in number to their own, it is not the fault of the Government of the United States, but comes from their own acts in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction, to become traders, farmers, and to follow professional pursuits.

It must be assumed in considering this question that the Indians themselves have determined to abandon the policy of exclusiveness, and to freely admit white people within the Indian Territory, for it cannot be possible that they can intend to demand the removal of the white people either by the Government of the United States or their own. They must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time it was abandoned forever."

It is common knowledge of persons conversant with local history that the situation had become such in 1893 that Congress decided that existing conditions should be changed, and that steps should be taken looking to ultimate statehood for Indian Territory and its inhabitants, Indian as well as white. By the appropriation act of that year, 27 Stat. at Large 612-645, a committee consisting of three members was provided for, to enter into negotiations with these tribes for the purpose of the relinquishment of the tribal title and the allotment of the lands in severalty to the individual members, having in view the ultimate creation of a state or states of the union which would embrace these lands. Up to this time, the policy of

35 the government had been to exclude white persons from these lands and from commingling with these Indians, but experience had shown this could no longer be done. The Indians themselves, by permitting intermarriage and by various ways, had defeated the governmental policy, and the white non-citizen population in the Indian Territory greatly outnumbered the Indians, and were constantly increasing. They were not amenable to the Indian Government. The Indian governments were far from satisfactory to the Indians themselves. Such was the condition that the Senate committee was forced to report:

"It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government cannot be continued; it is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the

Indian and whites alike, and such change cannot be much longer delayed. There can be no modification of the system. It cannot be reformed; it must be abandoned and a better one substituted." *Stephens vs. Cherokee Nation*, supra, p. 451.

This was the situation which forced Congress to a radical change of policy and a determination to effect a state government for Indian Territory as soon as it could be accomplished consistent with the rights and interest of the Indians. In the Indian Appropriation Act of 1896 (29 Stat. 321) Congress said:

"It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory, and afford needful protection to the lives and property of all citizens and residents thereof."

The work of preparing for this change fell upon the commission, first known as the Dawes Commission, and, latterly, as the Commission to the Five Civilized Tribes, acting under successive Congressional enactments and agreements with the tribes. The titles to the lands occupied by the various tribes vested in the respective tribes, and not in the individual members. *Cherokee Nation vs. Journey-cake*, 155 U. S. 196; *Shulthis vs. MacDougal*, 162 Fed. Rep. 331.

The work of the committee was first to determine who were the members of the tribes, and then to effect a division or allotment of the lands among them. Agreements were entered into with the various tribes, pursuant to which this allotment of lands was made.

In most instances the allottee took his land subject to restrictions upon alienation or incumbrance for a specified time, and it is the alleged sales or other disposition of such lands by the allottee before the expiration of the restriction period that has given rise to most of the suits now being considered. Their purpose is to restore to him the possession where he is not now in possession, and to cancel and annul, as a cloud upon the title, all instruments involved in such sales or disposition. It is clear, therefore, that the allottee himself is vitally interested in the relief sought. Are his personal status and his relations to the United States such that these suits may be maintained solely in the name of the United States? As to his personal status, a pertinent inquiry is,

Are the members of the Five Civilized Tribes citizens of the United States? At the time they were granted the land comprising the Indian Territory and during all the years they held the same up to the time when Congress first took active steps to effect an allotment in severalty, they were not citizens of the United States. *Elk vs. Wilkins*, 112 U. S. 99.

In the act of Congress of May 2, 1890, 26 Stat. 99, establishing United States courts in Indian Territory, it was provided that "Any member of any Indian tribe or nation, residing in the Indian Territory, may apply to the United States Court therein to become a citizen of the United States, and such court shall have jurisdiction thereof and shall hear and determine such application, as provided in the Statutes of the United States." But few Indians availed themselves of this privilege.

In the Indian Appropriation Act of March 3, 1893, 27 Stats. 645, is found the following provision:

"The consent of the United States is hereby given to the allotment of land in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

In the general allotment act of 1887 these Indians had been specifically excluded from its provisions. That act provided
37 that those Indians receiving allotments under its terms should become citizens of the United States. Now, six years later, Congress, by the section just quoted, consents that the Five Civilized Tribes may allot lands in severalty to each of their members, as they may deem proper, and upon such allotment extends to such allottees the right of United States citizenship in all respects.

Section 16 of the same act provides for the Commission to the Five Civilized Tribes to enter into negotiations with the tribes for the purpose of the extinguishment of the national or tribal title to their lands and the allotment of the same in severalty to the individual members, with the view to such an adjustment upon the bases of justice and equity, as met with the consent of such nations or tribes of Indians, so far as may be necessary, requisite, and suitable to enable the ultimate creation of a state or states of the union, which shall embrace the lands within said territory. The consent to allotment expressed by Congress in section 15 was necessary, because under the grants conveying these lands to the tribes, they could only be held by the Indians in their tribal capacity until such time as Congress should consent to a different holding. Sections 15 and 16 should be construed together. The purpose of Congress, as repeatedly expressed in this act, was to make an equitable division of the tribal or communal property both personal and real, among the individual members of the tribes, to the end that a state might be formed. To do this, the title had to be changed from tribal to individual, and Congress cleared the way for such distribution of property by consenting thereto. The tribes were then free to make such division, should they desire to do so, and it was the office of the Commission to endeavor to procure their consent to do so. The motive of Congress was to secure ultimate statehood, of which state the Indians should be citizens. It is of course presumed that Congress in this legislation had in view what it conceived to be the greatest good to all concerned. It was not disposed to force statehood upon these people, even if it could have done so. But it could and did take the lead in two very important steps, looking to statehood, that of

consenting to allotment and extending to allottees the privileges and immunities of United States citizenship. This was in 1893. It is now a matter of common knowledge that the Commission experienced many difficulties in reaching agreements with the tribes and much delay followed. It developed that it had a work of much more magnitude than had first been contemplated, and, from time to time, Congress enlarged its scope, and by successive acts provided more in

38 detail for the accomplishment of allotment and division of the lands. In 1901, its work was still unfinished; in fact, it was then just well begun. As yet but few of the Indians had taken their allotments, and as these were not taken under the scheme provided by the act of 1893, it is doubtful whether they thus became citizens. By act of Congress of March 3, 1901, 31 Stat. 1447, section 6 of the general allotment act of 1887 was amended by inserting the words "and every Indian in Indian Territory." So that the portion of the act relating to citizenship read "and every Indian born within the Territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, and every Indian in Indian Territory, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Section 8 of the Act of 1887 as originally passed, read as follows:

"That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies, and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order." Kappler's Laws, Vol. 1, 35.

It is contended that the amendment of 1901 made the act ambiguous and contradictory. It must be presumed that Congress had in mind all the terms of the act that was amended. It is clear that Congress meant to say and did say by the Amendment "every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens * * * without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The language is clear, and its intent and meaning cannot well be mistaken, and if in the other parts of the act as originally passed there are found provisions in conflict with the clear purpose
39 and intent of the amendment, they are in my judgment, so far as they conflict with the amendment, repealed by implication; but attention is called to the fact that section 6 was again

amended by the act of May 8, 1906, 34 Stat. 182. It is clear that the main purpose of this amendment was to provide that the allottee under the general allotment act of 1887 should not become a citizen of the United States upon delivery of the trust patent, but that such citizenship should be deferred until delivery of patent in fee simple. It is also observed that the words "and every Indian in Indian Territory," constituting the amendment of 1901, are omitted, and the section as amended is made to include this provision, "and provided, further, that the provisions of this act shall not extend to any Indians in the Indian Territory."

At the same session and only a few days before Congress had passed an act providing for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory, and was then considering the Oklahoma Enabling Act, which was passed shortly afterwards. It was natural, therefore, that having specially legislated for the Five Civilized Tribes, they should in amending this general allotment act exclude therefrom all reference thereto. But the status of United States citizenship had attached to the individuals of the Five Civilized Tribes by the amendment of 1901. Without determining whether Congress could, without the consent of a citizen of the United States and without any act on his part forfeiting the same, withdraw such citizenship, it will not be presumed that Congress even intends to do so, except where such interest is expressed in clear and unmistakable terms, and, in my judgment, the amendment of 1906 does not admit of such construction.

On June 16, 1906, Congress passed the Oklahoma Enabling Act, in the preamble of which it is described as "An act to enable the people of Oklahoma and the Indian Territory to frame a constitution and state government, and be admitted into the Union on an equal footing with the original states."

In this act it was further provided "that the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as herein-after provided." And in that act it was further provided:

That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory and Oklahoma, and
40 who have resided within the limits of said proposed state for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed state; and all persons qualified to vote for said delegates shall be eligible to serve as delegates."

Whether the Indians of the Five Civilized Tribes at the time of the passing of the Enabling act were citizens of the United States or not, its terms clearly make them electors and give them the right to participate in the formation of the state constitution and state government, if they were inhabitants of the area in the proposed state, and are members of Indian nations or tribes. In fact, several of them were members of the Constitutional Convention. The constitution framed pursuant to the Enabling act provides that the qualified electors of the state shall be male citizens of the United States, male

citizens of the State, and male persons of Indian descent, native of the United States, who are over the age of 21 years, etc. Upon submission of the constitution, as provided in the Enabling act, the President of the United States proclaimed statehood. The members of the Five Civilized tribes participated in all state, county and municipal elections; hold state and county offices; a member of the Chickasaw nation is now a representative in Congress, and a member of the Cherokee nation is now a United States senator from Oklahoma. In *Boyd vs. Thayer*, 143 U. S. 170, it is said:

"Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafter be controlled, and it also involves the adoption as citizens of the United States of those whom Congress makes members of the political community; and who are recognized as such in the formation of the new state with the consent of Congress."

In my judgment, therefore, the members of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges and immunities of citizenship. I am not unmindful of the fact that Congress by joint resolution of March 2, 1906, continued the tribal governments "in full force and effect for all purposes under existing laws, until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members." And that by act of Congress approved April 26, 1906, tribal existence was continued in full force and effect for all purposes authorized by law until otherwise provided by law."

But by various and successive acts of Congress these tribes have been shorn of their governmental functions; their courts have
41 long been abolished; their principal chief, or governor, as the case may be, is subject to removal by the President, who may fill the vacancy by appointment. Provision is made that their public school system shall be superseded by the state public school system; tribal tax is abolished; provision is made for the sale of their public buildings and lands; their legislature shall not be in session for a longer period in any one year than thirty days, and no act, ordinance, or resolution thereof except resolutions of adjournment, are valid without approval by the President. In *Buster vs. Wright*, 135 Fed. 951, Judge Sanborn said:

"Between the years 1888 and 1901, the United States, by various acts of Congress deprived this tribe (Creeks) of all its judicial power and curtailed its remaining authority until its powers of government have become the merest shadows of their former selves."

So it is with all the Five Civilized Tribes; but there is still undistributed tribal property, and until this is divided, it is essential that the tribal entity shall be maintained. In my judgment, the existence of this undistributed tribal property was the main reason for continuing the tribal existence, and such must have been the principal motive actuating Congress when the resolution of March 2, 1906, was passed, providing for the continuance of tribal existence "until all property of such tribe, or the proceeds thereof, shall be distributed among the individual members of said tribes."

It is a continuance of the tribe in mere legal effect, just as in many states corporations are continued as legal entities after they have ceased to do business, and are practically dissolved, for the purpose of winding up their affairs. It is not in my judgment a tribal existence incompatible with the enjoyment of full citizenship in the United States by the members of the tribes. Nor does the fact that these Indians have had restrictions upon alienation imposed upon their allotments necessarily affect their political status as United States Citizens. In *Re Heff*, 197 U. S. 508.

Can the right to maintain these suits be based upon treaty provisions relating to the protection of these Indians in their possession of the lands originally granted to the tribes? The grants of land made under the act of Congress of May 28, 1830, (4 Stats., 411) and the treaties entered into pursuant thereof, were to the tribes as such, and not to the individual members. This is clear from the fact, as we have seen, that it was then contemplated that these lands were so remote that they would never be desired for white settlement. It was then the policy of the government
42 to perpetuate the existence of the tribe, and there was no thought of tribal dissolution and the individual holding of the land. The Guarantees in the treaties related to tribal protection, and in my judgment cannot be invoked by the individual allottee under the changed conditions now existing. They imposed no duty or obligation upon the United States upon which these suits may be based.

The trust relation of the government recognized in *Beck vs. Flournoy Co.*, 65 Fed. 30, and kindred cases, known as the Flournoy cases, as arising from the fact that the legal title to the lands there involved was still retained in the government, does not exist here. It is alleged that by reason of the duties, obligations, and rights of the government, as set forth in this bill, the government is charged with the duty of protecting in the Courts the rights of the said tribes and members thereof, and in their behalf is charged with a trust of a high and delicate character. This is but a repetition of the allegations of guardianship, and we have now to consider whether in view of existing legislation and the present status of the individual allottee of either of the Five Civilized Tribes, these suits may be maintained by the United States as guardian for the Indian, acting in his stead, and without making him a party.

Does the relationship of guardian and ward now exist between the United States and the allottee with reference to his restricted land, in the sense originally recognized between the United States and the tribe and members thereof with reference to tribal property? The theory upon which this relation of guardianship arose and was recognized for so many years is well stated in the *United States vs. Kagama*, 118 U. S., at page 383, et seq., as follows:

"These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owed no allegiance to the States, and received from them then no protection. Because of the local ill feeling, the people of the States

where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. * * * The power of the General Government over these remnants of a race once powerful, now weak and diminished in

43 numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

It is evident the court has in mind the tribal Indians, "communities dependent upon the United States. Dependent largely for their daily food. Dependent for political rights. They owed no allegiance to the States, and received from them no protection." To this class of Indians the court say there arises the duty of protection, and with it the power. Congress and the courts have long recognized the relation of guardianship in such case, and such a relation was recognized as existing over the Five Civilized Tribes before the allotment, and in my judgment so exists now, with reference to tribal property. *Choctaw Nation vs. United States*, 119 U. S. 1.

The relation of guardianship is not established by Congress expressly saying in any particular act, "the United States is hereby declared to be the guardian of the Indians," but was deduced by the courts from a consideration of natural conditions and constitutional and legislative provisions, as being that most nearly approaching the peculiar relation existing between the United States and the Indian tribes when the matter was first presented for judicial consideration (*Cherokee Nation vs. Ga.*, 5 Peters 1) and of course recognized as continuing so long as the conditions giving rise to it existed. But Congress may terminate this relation at any time. As said by Mr. Justice Brewer, in the *Heff* case, (197 U. S. 499):

"Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true, there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear, the question is at an end."

Whether the relation is now terminated or materially changed by

44 Congress, we are to determine from a consideration of recent legislation and change wrought thereby. As the relation was not established by any express provision, neither is it necessary to its termination. These allottees are now citizens of the United States and citizens of the State of Oklahoma. (Slaughter House Cases 16 Wallace, 36). As such they have the right to make and enforce contracts; to sue; be parties; give evidence, and to inherit, purchase, lease, sell and convey property. Civil Rights Case 109 U. S. 1. The fact that the allottee holds land all or a part of which is alienable for a fixed period does not affect his civil or political status. In re Heff, *supra*. Nor does it follow that because as a citizen he may make contracts generally with reference to his property, that he may therefore dispose of restricted lands before the expiration of the restricted period. Flournoy cases, *supra*.

In 19th Opinions of Attorneys General, at page 232. Mr. Garland said of the effect of the general allotment act of 1887, whereby individual allottees were given the right of occupancy of separate tracts, the title to which the Governments held in trust for twenty-five years:

"In this new mode of life, the guardianship which heretofore has been exercised over the tribe is to be transferred to the individual allottees provided for in this act. * * * Prior to the issuing of the second patent, the United States is to act as trustee of the lands. This relation as to the lands is substituted for the guardianship heretofore exercised over the tribe."

United States vs. Dooley, 151 Fed. 697, was a recent case instituted in the United States circuit court, E. D. Washington, by the Government in its own behalf to cancel a deed made by Susan Swasey, an allottee holding a trust patent, to the other defendants, the Allottee, Susan Swasey, is made a party defendant. Concerning the relation of the allottee to the Government, the Court says.

"The contention that the relation of guardian and ward exists between the complainant and the allottee cannot be sustained, for the statute terminated that relation, at least in so far as it affects her personal acts and political status as an Indian. Such was the holding in the Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506. 49 L. Ed. 848. The argument that the same relations exists between the Government and the Indians since as before the passage of the act was answered by Mr. Justice Brewer in delivering the opinion of the court as follows: 'But the logic of this argument implies that

45 the United States can never release itself from the obligation of guardianship; that, so long as an individual is an Indian by descent, Congress, although it may have granted all the rights, and privileges of national and therefore state citizenship, the benefits and burdens of the laws of the state, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the state, and release him from obligations of obedience thereto. Can it be that, because one has Indian and only Indian blood in his veins he is to be forever one of a special class over whom the general govern-

ment may in its discretion assume the rights of guardianship which it had once abandoned, and this whether the state or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound.'

The right to maintain the suit must therefore rest upon other grounds [that] that of the relation of guardian and ward, but it does not follow that because such status has been abolished that the government is remediless. The authority rests upon another well defined principle. The complainant is still vested with the legal title to the land, etc."

In *Ex parte Savage*, 158 Fed., 205, Judge Pollock, of the Kansas District, said:

"Since the decision by the supreme court in the case in *Re Heff* * * * it cannot be doubted, I think, under act of Congress of February 8, 1887, * * * when Indians have been allotted in severalty and have received their patent, they are no longer wards of the government, but are citizens of the United States and of the state in which they reside, and are entitled to all the rights, guaranteed to citizens of such state."

In the act of 1887 not only were the allottees restricted from selling the lands but the legal title thereto was reserved in the United States during the restriction period. The allottees here involved are restricted from selling for a fixed period, but the title is not reserved. Certainly if in the former case the relation of guardian and ward does not exist, it does not in the latter, unless for some other reason. Had it been the desire of Congress and the Five Civilized Tribes that the trust relation provided in the general allotment act should prevail here, it could readily have been accomplished by providing that the title should be held in trust by the tribe for the restricted period, to be finally patented to the allottees free from incumbrance, etc. The trust relation of

46 the tribe and the unquestioned right of the government to control tribal property would, in my judgment, have entitled the United States to sue in behalf of the tribe to cancel any conveyance made by the allottee. This of course would have involved the continuation of the tribe in legal effect during the restriction period, or until other disposition of the trust was provided, and it is probable that if such a disposition of the matter was considered it was not adopted because of the desire to sooner abolish tribal existence. It is to be remembered that the act of 1893, 27 Stat. 645, contemplated the extinguishment of the title, either by cession to the United States or by allotment to the individual Indians. Had the former been done, then allotment could have been effected similar to that under the act of 1887; but this was not done. The restrictions upon alienation were placed upon these lands for some purpose, however. Let us see what it was. In *Beck vs. Flournoy Company*, 65 Fed. 34, Judge Sanborn says:

"The motive that actuated the lawmaker in depriving the Indians of power of alienation is so obvious, and the language of the statute in that behalf is so plain as to leave no room for doubt that Congress intended to put it beyond the power of white men to

secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians."

Speaking of restricted allotments, under the general act, Judge Phillips says, in *Goodrun vs. Buffalo*, 162 Fed. 817,

"Accordingly, while authorizing the allotments in severalty, Congress conceded the lands with a firm cable attached to hold them to the exclusive use and possession of the Indians without qualification, restricting the power of divesting themselves of the use and title until after the fixed period."

There are numerous cases holding that the attempted conveyance of restricted allotted land is void, and that the purchaser, even though he has paid the purchase price, does not secure even an equitable title, nor can title be built up by adverse possession, estoppel, or any statute of Limitations. *Clark vs. Akers*, 16 Kansas, 166. *Shelton vs. Donohoe*, 40 Kansas, 346. *Schrimpacher vs. Stockton*, 183 U. S. 295. *Beck vs. Flournoy Company*, 65 Fed., 30. *Harris vs. Hardridge*, 166 Fed. 109. *Goodrun vs. Buffalo*, 162 Fed. 817.

In the *Buffalo* case last cited, Judge Phillips says:

"There is but one opinion among the courts, with the single exception of the ruling in said United States Court of Indian Territory, as to the construction of such acts of Congress and patents made thereunder; and that is, that any and all schemes and devices resorted to for the purpose of acquiring title to the Indian allotments during the period of such limitation, are abortive. This for the palpable reason that it is a period of absolute disability on the part of the Indian to alienate his lands."

It follows that in any case wherein an allottee has been induced to dispose of any of his restricted land contrary to the laws under which it was set apart to him, he may, if the pretended purchaser has gone into possession, bring suit in ejectment and recover the same, and no rights accrue to the defendant in such cases by virtue of such transaction which he can interpose as a defense. If in such case the allottee is still in possession, he can successfully defend against a suit brought by such pretended purchaser to secure possession by virtue of such pretended conveyance. He can, in short, institute and maintain any action in relation to his restricted land, which any other citizen might prosecute in relation to real property, and no deed, mortgage, lease, contract of sale, power of attorney, or other instrument of conveyance made by such allottee regarding his restricted land, contrary to the tribal agreements and acts of Congress relating thereto, can be legally urged as a defense to such action. As said by Judge Phillips, in the *Buffalo* case, *supra*:

"It should be understood, once and for all, that no scheme or device, however ingenious or plausible, concocted by any person, can avail to divest the Indians of the Title to their allotted lands within the period of limitation prescribed by Congress."

Having given the allottee the right of citizenship and clothed him with these unusual safeguards against his improvidence, has Congress in addition thereto, by the mere fact of placing restrictions upon the alienation of the land, intended thereby to reserve to the United

States the right to sue in its own name to set aside such illegal transaction, and recover for the allottee such restricted property?

If such a right is reserved to the Government, and we are correct in the conclusion that the allottee is a citizen and may also maintain an action for the same purpose, then we have an anomalous condition under which, while the Government suit is pending in this court, the allottee, who is not a party here, if he sees fit, may go into the State court and sue the same defendant for the same relief. What rule of law is there binding the allottee by the suit in this court, to which he is not a party, even though it be professedly for

his benefit? My attention is called to none, nor do I know of any. Suppose a final decree is rendered in this court against the Government, with regard to any particular allotment, and suppose thereafter the allottee proceeds to bring suit in his own name against the same defendant or defendants, for identically the same cause of action and seeking identically the same relief, can these defendants plead as a defense in that suit the decree rendered here in a case to which the allottee was not a party? It is certainly extremely doubtful. In my judgment, the purpose of Congress to establish such an extraordinary condition as this, must appear very plainly to warrant a court in arriving at such a conclusion. In the United States vs. Payne Lumber Company, 206 U. S., at page 473, it is said:

"The restraint upon alienation must not be exaggerated. It does not of itself divest the right below a fee."

It must be borne in mind that the cardinal purpose of Congress was the creation of a state, of which the Indians were to be citizens. Continued guardianship of the Indians was incompatible with citizenship, national and state. In my judgment when Congress clothed the allottee with full citizenship and to provide against his improvidence, vested in him title to his alienable land, so that no scheme nor device, however ingenious, could divest him thereof, it did so for the very reason that in carrying out the original plan of statehood, which was to include the Indian, his status as ward of the Government was not in the nature of things compatible with full citizenship in the state and union, and that it was not intended by Congress that the guardianship should longer continue.

(United States vs. Auger, 153 Fed. 671.)

By this I do not mean to say that Congress may not make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if statehood had not ensued, for it reserved that right in the enabling act. But we are not now concerned with what Congress may do, but what it has done. I am not unmindful of the Act of March 3, 1905, and subsequent acts relative thereto. By the act of March 3, 1905, (33 Stat., Part 1, 1060) it is provided:

"It shall be the duty of the Secretary of the Interior to investigate, or cause to be investigated, any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the

49 Five Civilized Tribes, and he shall in any such case where in his opinion the evidence warrants it, refer the matter to the Attorney General for suit in the proper United States Court to cancel the same, and in all cases where it may appear to the court that any lease was obtained by fraud or in violation of such agreements, judgment shall be rendered, cancelling the same upon such terms and conditions as equity may prescribe, and it shall be allowable where all parties [—] interest consent thereto to modify any lease and to continue the same as modified; Provided, no lease made by any administrator, executor, guardian, or curator which has been investigated by and has received the approval of the United States Court having jurisdiction of the proceeding shall be subject to suit or proceeding by the Secretary of the Interior or Attorney-General".

The act of March 1, 1909 (34 Stat., Part 1, 1026), contains this provision:

"To enable the Secretary of the Interior to investigate or cause to be investigated any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud or in violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the Act approved March third, nineteen hundred and five, ten thousand dollars."

The act of April 30, 1909, (Indian Appropriation Act), also provides:

"To enable the Secretary of the Interior to investigate or cause to be investigated any lease, power of attorney, contract, deed, or agreement to sell any allotted land which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the Act approved March third, nineteen hundred and five, ten thousand dollars.

This act is a legislative declaration that in 1905, before it was passed, no duty devolved upon the Secretary to supervise the allottee in the leasing of his land, except where the law specially provided that such lease should be subject to his approval. In *Beck vs. Flourney Company*, supra, Judge Thayer said:

"It is manifest that the amendment in question, authorizing allotted land to be leased in certain cases under the direction of the Secretary of the Interior, was unnecessary if power to execute leases of allotted lands had already been conferred by previous enactments or treaty stipulation. The last mentioned act, therefore, is a legislative declaration that Congress did not intend by any previous
50 statute to authorize the leasing of any lands that might be assigned to Indians to be held by them in severalty."

But the Secretary of the Interior is charged with the supervision of all Indian Matters wherein the government still retains guardianship, and this duty would have existed without legislation, if at that time the government still retained the guardianship of the allottee with regard to the land covered by the lease referred to.

It is noted further that the matter is to be referred to the Attorney General for suit in the proper United States Court, and in the proviso they are referred to as suits or proceedings by the Secretary of

the Interior or the Attorney General. Whatever may have been the status of the allottee in 1905, it is clear that in a suit now instituted under this provision to cancel or modify a lease, the allottee is a necessary party. First: Because he is one of the main parties in interest and for reasons heretofore adverted to, is necessary to a complete determination of the controversy, And, Second: Because as one of the parties in interest his consent to any modification of the lease as provided for is necessary.

While the appropriation of April 30, 1908 is made to cover investigation by the Secretary of powers of attorney, deeds, or agreements to sell any allotted land, in addition to the leases, provided for in the original act and other appropriation acts, the act refers in terms to the original act, which provides only for suits by the Attorney General regarding leases. There is nothing in this legislation which, in my judgment, authorizes the government to maintain the suits at bar independent of the allottee and without making him a party. It follows that in the present bills is a defect of parties.

It is urged that even though the complainant may have the capacity to maintain these suits, the bills are subject to the objection of multifariousness, because numerous defendants are joined in each bill, for the reason that they are alleged to be connected with many distinct transactions regarding as many distinct tracts of land.

A bill is said to be multifarious when it improperly joins distinct and independent matters and thereby confounds them, as for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant. Or the demand of several matters of a distinct and independent nature against several defendants in the same bill. Words and Phrases, Vol. 5, P. 4615.

In *Barcus vs. Gates*, 89 Fed., 783, it is said:

51 "Multifariousness arises from the fact either that the transaction- which form the subject matter of the suit are so separate and dissimilar that they cannot conveniently be tried in one record, or that one defendant is able to say that as to a large number of the transactions set out in one bill he has no interest or connection whatever. A bill is not multifarious because there are several causes of action, if they occurred out of the same transaction, and if all the defendants are interested in the same rights and the relief against each is of the same general character, the bill may be sustained."

In *Hale vs. Allison*, 188 U. S., 56, the suit of [of] a receiver against numerous stockholders to enforce their liability, the Court approves and adopts the opinion of District Judge McPherson, in the lower court. While that discusses the question of multiplicity of suits rather than multifariousness, the opinion is very pertinent to the situation here. In the course of the opinion, it is said:

"If, as is sure to happen, different defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. But even if the grounds of diminished trouble and expense may seem to be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the Court is certain to be the beginning of a long and expensive litigation. The hearings are sure

to be protracted. Several, perhaps many counsel will no doubt be concerned, whose conveniences must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of witnesses will not in any degree be diminished, and if some docket costs may be escaped, that is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill [ever] separate action at law."

Suppose the court were to retain jurisdiction of these bills and require that the allottees all be made parties, either as plaintiffs or defendants. The bill would then essentially involve a multitude of separate suits, each by an allottee, the main party in interest, as plaintiff, and one or more but not all of the defendants, as defendants.

I appreciate fully the motive of the pleaders who conceived that the government was the only necessary plaintiff, so that each bill would be merely the suit of one plaintiff against various defendants, and, conceiving that each bill involved practically but one question of law, in the determination of which all of the defendants were equally interested, deemed it most practical to institute one suit instead of many.

52-55 But to my mind these bills, viewed from any standpoint consistent with the facts and conditions involved, each essentially combine a multitude of separate and distinct plaintiffs against separate and distinct defendants, and are subject to the objection of multifariousness.

There are other grounds of objection raised by the demurrer not necessary now to consider. For the reasons set forth in this opinion, the demurrers, in my judgment should be sustained, and the bills dismissed.

It is so ordered.

(Signed)

RALPH E. CAMPBELL, *Judge*.

Muskogee, Oklahoma, August 6, 1909.

Endorsed as follows: In the United States Circuit Court for the Eastern District of Oklahoma. The United States of America, Complainant, vs. James P. Allen, et al., Defendants. No. 284 and Similar Cases. Opinion Sustaining Demurrers. Filed Aug. 6, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

* * * * *

56 The following Decree and Order was then entered in said cause:

In the United States Circuit Court for the Eastern District of
Oklahoma.

No. 429. In Equity.

THE UNITED STATES OF AMERICA, Complainant,

vs.

JOHN F. McCLELLAN et al., Respondents.

Decree.

On this thirteenth day of September, 1909, on consideration of the demurrers to the bill filed by the various defendants herein, which were heretofore argued and submitted and by the Court taken under advisement, the Court now finds that the complainant has not such an interest in the matters involved in this cause as entitles it to maintain this action; that the various allottees and patentees of the lands involved in this action are necessary parties thereto, and that there is, therefore, a defect of parties; and that the bill is multifarious.

It is the judgment of the Court that for the foregoing reasons the demurrers should be sustained.

57 It is Therefore Ordered, that the demurrers herein now being considered be sustained and the bill dismissed, at the Complainant's costs.

RALPH E. CAMPBELL, *Judge.*

Endorsed as Follows: No. 429. The United States v. John F. McClellan, et al. Decree and Order. Filed in Open Court, Sep. 13, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

(i.)

Prayer for Appeal.

Thereupon the complainant prayed an appeal in open Court, and that the Clerk be ordered to prepare and authenticate a transcript of the record, which said prayer for appeal and order are in words and figures as follows:

In the United States Circuit Court for the Eastern District of
Oklahoma.

No. 429. In Equity.

THE UNITED STATES OF AMERICA, Complainant,

vs.

JOHN F. McCLELLAN et al., Respondents.

Petition for Allowance of Appeal.

To the Honorable Ralph E. Campbell, Judge of said Court:

Comes now the above named complainant, by its solicitors, and considering itself aggrieved by the decree and order made and entered in this cause on the thirteenth day of September, 1909, does hereby appeal from said decree and order to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that its appeal be allowed, and that a transcript of the record proceedings and papers upon which said decree was based, duly authenticated and consisting of:

First. The bill of Complaint, except such transactions in Paragraph Six thereof, as to which special orders of dismissal have been heretofore entered on petition of complainant.

Second. One copy each of the different demurrers filed herein;

Third. Final Decree and Orders;

Fourth. All endorsements of filings of documents above specified;

Fifth. Copy of Appeal and Assignment of Error;

Sixth. Copy of Order allowing the same;

58 Eighth. The opinion of the Court;

may be prepared by the Clerk, and transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

THE UNITED STATES OF AMERICA.

By GEORGE W. WICKERSHAM,

Attorney-General.

By A. N. FROST,

Special Assistant to Attorney General.

(j.)

Allowance of Appeal.

Thereupon the Court allowed said appeal, and ordered the Clerk to prepare and authenticate a transcript of the record, as prayed for. Said allowance and order are in words and figures as follows:

The foregoing petition is granted, and the appeal allowed, and the Clerk is instructed to make and authenticate the record, as above set forth.

Done this Sept. 13, 1909.

RALPH E. CAMPBELL, *Judge.*

Endorsed as follows: No. 429. The United States v. John F. McClellan, et al. Petition for Appeal and Order. Filed in open Court, September 13, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

(k.)

Assignment of Errors.

Thereupon the complainant filed assignment of error, which said assignment of error is in words and figures as follows:

In the United States Circuit Court for the Eastern District of Oklahoma.

No. 429. In Equity.

THE UNITED STATES OF AMERICA, Complainant,
vs.
JOHN F. MCCLELLAN et al., Defendants.

Assignment of Error.

Comes now the complainant in the above entitled cause, by its Solicitors, and files the following assignment of error upon which it will rely for grounds of reversal in its appeal from the order and decree made by this honorable court on the thirteenth day of September, 1909, in the above entitled cause:

That the court erred:

59

1.

In sustaining the demurrers filed herein, and ordering said cause dismissed.

2.

In holding that said cause could not be maintained in the name of the United States as sole complainant, for the reason that Congress has not so authorized, and for other reasons.

3.

In holding that the members of the Five Civilized Tribes are citizens of the United States.

4.

In holding that the allottees' personal status as citizens, and relation to the United States, are such that this suit cannot be maintained solely in the name of the United States, and that the guardianship of the United States is incompatible with such citizenship.

5.

In holding that the guaranty of the United States and its guardianship extends only to the Five Civilized Tribes, and not to the individual members thereof.

6.

In holding that a termination of the relationship of guardian is shown by the legislative enactments with reference to the disposition of the affairs and property of the Five Civilized Tribes and its members, together with the alleged granting of citizenship.

7.

In holding that the restrictions placed on the alienation of the lands allotted to the members of the Five Civilized Tribes did not reserve to the United States the right to sue in its own name to set aside any transactions made in contravention of such laws against alienation, and to recover for the allottee his property so attempted to be alienated.

8.

In holding that there exists no duty, policy or power in the United States upon which can be predicated the right of the United States to maintain this cause in its own name.

9.

In holding that the allotment of the lands of the Five Civilized Tribes to its members, subject to certain restrictions, and the citizenship alleged to have been created, fulfilled any duty which may have existed in the United States to any of the citizens of the Five Civilized Tribes.

10.

In holding that the allottees are necessary parties to this cause.

11.

In holding that there is a defect of parties in said bill.

12.

In holding that said bill is multifarious.

13.

In holding that there is a misjoinder of causes of action in this bill.

14.

In holding that there is a misjoinder of parties in this bill.

60-63

15.

In failing to hold that the Acts of Congress removing restrictions from the land of certain of the allottees of the Five Civilized Tribes did not affect the duty owed by the United States to secure the cancellation of any instruments attempting to convey the inalienable allotments of said allottees, and to restore to the said allottees the land so attempted to be conveyed while restricted, nor its right to bring an action in its own name as sole complainant for said purpose.

16.

In failing to hold that the transactions set forth in paragraph six of the bill of complaint, being attempted conveyances of their allotments by citizens of the full blood of the Cherokee Tribe of Indians, whose certificates of allotment were issued subsequent to April 26, 1906, were illegal for the reason that said allotments, at the dates of the said attempted conveyances thereof, were, and now are, inalienable, the restrictions thereon not having been removed nor any of said alleged deeds having been approved by the Secretary of the Interior.

17.

In failing to order that said attempted conveyances, so complained of be cancelled, and possession of the lands involved therein given to the heirs of the allottees thereof, and that the title of said allottees be quieted, and decreeing accordingly.

18.

In failing to rule that said demurrers should be overruled.

19.

In failing to decree that the United States, on the allegations of the bill, is properly the sole complainant, and entitled to the discovery and relief prayed for.

Wherefore; For these, and divers other errors appearing upon the record, the appellant prays that the decree and order herein be reversed, and that the United States Circuit Court of Appeals for the Eighth Circuit render such proper decrees and orders on the record as justice and equity demand.

THE UNITED STATES OF AMERICA,
By GEORGE W. WICKERSHAM,
Attorney-General,

By A. N. FROST,
Special Assistant to Attorney-General.

Endorsed as follows: No. 429. The United States v. John F. McClellan, et al. Assignment of Error. Filed in open Court, Sep. 13, 1909, L. G. Disney, Clerk, U. S. Circuit Court, Eastern Dist. Okla.

(L)

Authentication.

I, L. G. Disney, Clerk of the United States Circuit Court for the Eastern District of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct transcript of so much of said cause as the same appears on file and of record in my office at Muskogee as was ordered to be prepared and authenticated.

In testimony whereof, Witness my hand and official seal, this the 16th day of September, A. D. 1909.

[Seal U. S. Circuit Court, East. Dist. Oklahoma.]

L. G. DISNEY, *Clerk*,
By OTIS LORTON, *Deputy*.

Filed Sep. 17, 1909, John D. Jordan, Clerk.

* * * * *

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(*Order of Submission.*)

And on the seventh day of December, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

TUESDAY, *December 7, 1909.*

* * * * *

No. 3162.

THE UNITED STATES OF AMERICA, Appellant,
vs.
JOHN F. McCLELLAN et al.

* * * * *

Appeals from the Circuit Court of the United States for the Eastern District of Oklahoma.

These causes having been called this day for further hearing, argument was continued by Mr. S. T. Bledsoe, Mr. George S. Ramsey, Mr. B. B. Blakeney, Mr. James E. Humphrey, Mr. Joseph
65 C. Stone and Mr. Robert L. Owen and concluded by Mr. Assistant Attorney General Russell.

Thereupon each of the above named causes was submitted to the Court on the transcript of record as printed for the use of the Court in each of said cases and upon the briefs filed by counsel for various parties herein.

(*Opinion.*)

And on the eighth day of June, A. D. 1910, the opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to-wit:

66 United States Circuit Court of Appeals, Eighth Circuit,
May Term, A. D. 1910.

No. 3150.—United States, Appellant, vs. James P. Allen et al.

No. 3151.—United States, Appellant, vs. N. E. Patterson et al.

No. 3152.—United States, Appellant, vs. Charles E. McPherran
et al.

No. 3153.—United States, Appellant, vs. F. B. Severs et al.

No. 3154.—United States, Appellant, vs. Wilson Bruton et al.

No. 3155.—United States, Appellant, vs. Norman Pruitt et al.

No. 3156.—United States, Appellant, vs. James Jefferson et al.

No. 3157.—United States, Appellant, vs. J. J. Creamer et al.

No. 3158.—United States, Appellant, vs. Filix R. Phillips et al.

No. 3159.—United States, Appellant, vs. J. M. Dickenson et al.

No. 3160.—United States, Appellant, vs. James P. Allen et al.

No. 3161.—United States, Appellant, vs. Walter F. Nichols et al.

No. 3162.—United States, Appellant, vs. John F. McClellan et al.

No. 3163.—United States, Appellant, vs. Alfred F. Goat et al.

No. 3265.—United States, Appellant, vs. George C. Crump et al.

No. 3276.—United States, Appellant, vs. C. J. Benson et al.

No. 3279.—United States, Appellant, vs. J. O. Davis et al.

Appeals from the Circuit Court of the United States for the Eastern
District of Oklahoma.

Mr. Charles W. Russell, Assistant Attorney General, for Appel-
lant.

Mr. S. T. Bledsoe, Mr. George S. Ramsey, Mr. B. B. Blakeney,
Mr. James E. Humphrey, Mr. Joseph C. Stone and Mr. Robert L.
Owen, pro se, (Mr. A. W. Clapp, Mr. O. L. Rider, Mr. Kenneth S.
Muchison, Mr. Wm. M. Matthews, Mr. C. L. Thomas, Mr. N. A.
Gibson, Mr. Robert J. Boone, Mr. George C. Butte, Mr. Garfield
Johnson, Mr. T. S. Cobb, Messrs. Crump, Rogers & Harris, Messrs.
Willmott & Wilhoit, Mr. W. L. McCann, Mr. Thomas H. Owen,
Mr. W. B. Crossan, and Messrs. Davis & Davis were with them on
the briefs) for Appellees.

67 Before Hook and Adams, Circuit Judges, and Amidon, District Judge.

AMIDON, *District Judge*, delivered the opinion of the Court.

The lands of the five civilized tribes were allotted in severalty to their members, subject to express restrictions against their alienation for specified periods of time. The bills in these suits charge that many thousand conveyances have been made in violation of those restrictions, and the suits have been brought by the United States to have some four thousand of these conveyances declared to be void and cancelled of record. The restrictions against alienation arise out of numerous statutes and treaties, and vary according to such matters as the amount of Indian blood of the allottee, whether the land was a homestead, and whether it was held as an original allotment or by inheritance. The grantees under the conveyances are classified according to some distinct feature of the restriction upon alienation, and all grantees coming under each class are combined as defendants in a single suit. The allottees are not made parties either as plaintiff or defendant, and it is not charged in the bills that the conveyances were obtained by fraud, misrepresentation, or for an inadequate consideration. They are assailed solely upon the ground that they were made in violation of the restriction which Congress imposed upon the alienation of the allotments.

These bills were demurred to upon numerous grounds. The demurrers were sustained by the trial court for the reason (1) that the complainant has not such an interest in the matters involved as entitles it to maintain the action; (2) that the allottees are necessary parties, and that there is therefore a defect of parties; (3) that the bills are multifarious. A decree was entered in each case dismissing the bill upon the merits, to review which is the object of this appeal.

The consideration of the case will be simplified if it is understood at the outset that the plan of the government in dissolving the five civilized nations and distributing their lands in severalty, was not simply a real estate transaction. It was a great governmental project, having for its object the social and industrial elevation of the Indians. For the accomplishment of that result there were two main reliances: (1) the added incentive which comes from the individual ownership of property as distinguished from its joint or tribal ownership; (2) the continuance of that ownership for such a period as should bring the Indian into a state where he could safely be trusted to protect his interests in the sharp competition with members of the white race. During all the years that this scheme was in process of execution, the Indian lands, like the Indians themselves, were subject to the supreme authority of the national government. The United States proceeded, in so far as it
68 could, with the consent of the Indians. That, however, it did as a matter of wise governmental policy, and not in obedience to any constitutional restriction. Whenever it encountered the obstinate opposition of the Indians to its plans, it

did not hesitate to set aside their will and substitute its own authority. The title to these lands was in the Indian tribes, and the formal conveyances to the individual members were made by tribal officers. All this, however, was done in obedience to the regulations of the national government. To attempt to cramp these large governmental measures to the narrow limits of a real estate transaction is to deprive them of their distinctive character. And yet much of the argument contained in the briefs, as well as the opinion of the trial court, treats these measures as a matter between grantor and grantee, and wherever they do not fit the private law of real property, they are declared to be ineffective.

The same observations may be made as to the statement of the relation between the national government and the Indians being that of guardian and ward. These are familiar terms in decisions dealing with Indian matters. They are however, words of illustration, and not of definition, and to attempt to reason from the private law of guardian and ward to the measures of the federal government in dealing with the five civilized tribes, leads only to confusion and the subversion of the real scheme of government.

Turning now to the objections which were made and sustained by the trial court, has the federal government such an interest as entitles it to maintain these suits? It will be conceded at the outset that it has no legal or equitable estate in the allotments; and if such an estate is necessary, it has no standing in court. It is, however, too plain for controversy, that the federal government imposed restrictions upon the alienation of these allotments. That restriction was its main reliance for the social and industrial elevation of the Indians. Has it a standing in Court for the enforcement of its policy? To say that it has not is to make the restraints upon alienation a mere *brutum fulmen*. Shall the Indians who are intended to be restrained, be made the sole agency for the enforcement of the restraint? If so, the act of Congress is nothing more than a benevolent admonition. If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation a pauperized, discontented and, possibly, belligerent people. To prevent such results the United States may invoke the aid of its courts. That question was put to rest in the decision of *In re Debbs*, 158 U. S., 564. When a suit in equity is an appropriate method for the enforcement of a governmental policy, the national government may maintain such a suit. The present case presents a right of the nation which has been violated and cannot be redressed in any other way than by a suit in equity. If its interest in its measures does not give it a standing in court, then the violation of those measures must go wholly without re-

dress. Governmental action cannot be thus paralyzed. If the aid of the court is an appropriate remedy, the government has the same right to proceed in that manner that it has to use executive power where that power is an appropriate agency for the accomplishment of its purposes.

The Supreme Court of the United States in the case which carried the emancipation of the Indians and their property to the fullest extent, expressly recognizes the right of the government to enforce, by appropriate action in court, the restraints which it imposed upon the alienation of Indian allotments. The court says in the *Heff* case, 197 U. S., 489, 509: "Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a National or state court. * * * Many a tract of land is conveyed with conditions subsequent. A minor may not alienate his lands; and the proper tribunal may at the instance of the rightful party enforce all restraints upon alienation."

Under the general allotment act of 1887, a provisional patent was issued to the allottee, and the naked legal title retained in the government for the period of twenty-five years. In the case of the five civilized tribes, this plan was modified to the extent of granting the legal title to the Indian, but imposing upon it a restraint against alienation. These plans present simply differences of method. The object sought in each case was the same, namely, to clothe the Indian with such title to the property as seemed best calculated to encourage his industrial development, and yet accompany this grant with such a restriction as would prevent the main reliance of the government for the industrial betterment of the Indian from being defeated by the alienation of the property. The right of the government to invoke the aid of its court to prevent the defeat of its object is the same under the one statute as the other. Its right to maintain a suit to prevent the defeat of its allotment scheme under the general law of 1887, is fully sustained in *United States v. Rickert*, 188 U. S., 432. It is contended, however, in the present case, that that decision is not controlling because there the government held the legal title to the property for a period of 25 years in trust for the Indian, but subject to a restraint upon alienation, whereas here the legal title has been conveyed to the Indian. The decision in the *Rickert* case does not rest upon a principle of the law of real property but upon the power of the nation to enforce its own measures. At page 444 of the opinion the right of the government to maintain the suit is declared to rest, not upon the fact that it held the title to the property, but, to use the language of the court, upon "the injurious effect of the assessment and taxation complained of upon the plans of the government with reference to the Indians." In either case it is not a right of property which is enforced, but a plan of government. The Supreme Court there declares the right of the nation to maintain a suit for the enforcement of its policy in

regard to Indian allotments to be too plain for argument. 188 U. S., 444. This statement is approved in *McKay v. Kalyton*, 204 U. S., 458, 467.

But we are not left to inference from the general scheme of the national government in its dealings with the five civilized tribes, to find authority for the maintenance of these suits. They are authorized by express act of Congress. The last paragraph of Section 6 of the Act of May 27, 1908 (35 Stat. at Large, 312), is a saving clause. Viewed solely in that light it declares the belief and intent of Congress that the rights which it saves, exist. It does not, however, stop with the language which saves the rights specified, but proceeds to declare the conditions upon which those rights shall be exercised by stating that the suits shall be brought upon the recommendation of the secretary of the interior, and without cost to the allottees. It thus passes beyond the scope of a saving clause, and uses language which is consistent only with the grant of the power to institute the suits. When this language is read in connection with the earlier part of the section appropriating \$50,000 to cover the expenses incurred by the attorney general in this litigation, the intent of Congress that the power to maintain the suits is granted, and its purpose that such suits should be instituted in proper cases, is clearly manifest. It is incredible that the purpose of Congress was simply to provide for the institution of suits to obtain a judicial determination as to whether the power of the government to maintain such suits existed. Congress, by its own declaration, could have placed that question beyond controversy, and the courts ought not to give a meaning to its acts which would make of them a mere squandering of public funds. That which is implied is as much a part of a statute as that which is expressed. *City of Little Rock v. U. S.*, 103 Fed., 418; *United States v. Babbitt*, 1 Black, 55. Implications far less clear than the power to maintain these suits, have been enforced by the courts. *Gelpeke v. City of Dubuque*, 1 Wall., 220; *Postmaster General v. Early*, 12 Wheaton, 135, 146; *Telegraph Company v. Eyser*, 19 Wall., 419; *Great Northern Railway Co. v. United States*, 155 Fed., 945. The trial court held that, because a statute conferring the jurisdiction here in question by more direct language, was not enacted, though brought to the attention of the committee having the present act in charge, that this amounted to an expression of the legislative intent that the right itself either did not exist or was so doubtful that the only proper procedure was to make provision for a judicial determination of its existence. Courts can find the intent of the legislature only in the acts which are in fact passed, and not in those which are never voted upon in Congress, but which are simply proposed in committee. It is not contended that the bill referred to was ever brought

to a vote in Congress and rejected. It was simply one of the measures which was under consideration at the time the act of May 27, 1908, was passed. To hold that such facts can be looked to for the purpose of narrowing the effect of a statute actually passed would be to invent a new and dangerous canon of statutory interpretation.

Much of the briefs is devoted to arguments deduced solely from the fact that Congress has conferred national citizenship upon the Indians. These arguments have been frequently presented to the courts, but so far as we are aware, they have never defeated the exercise of national authority over the Indian except in the *Heff* case, 197 U. S., 488. That decision, however, as now explained by the Supreme Court in *United States v. Celestine*, 215 U. S., 278, lends no support to the defendants. The case arose under the general allotment act of 1887. That statute provides that, upon the completion of the allotments, the Indians "shall have the benefit of, and be subject to the laws, both civil and criminal, of the State." Mr. Justice Brewer carries this feature of the statute through his opinion at every step as the basis of the decision of the court. He has now removed all possible doubt on the subject by his opinion in the *Celestine* case, where he expressly states that the *Heff* opinion rests upon the fact that under the general allotment act Congress has, by direct provision, entirely renounced its own authority over the Indians, and subjected them to the laws of the state, both civil and criminal. The decision of the *Heff* case simply gives effect to this positive declaration of the legislative intent. In its dealings with the five civilized nations, Congress has been at great pains to indicate a different purpose. Here it has from time to time down to the organic act admitting Oklahoma, and the provisions which it insisted should be embodied in the constitution of that state, reserved to itself express authority to pass such laws with respect both to the Indians and their lands, as shall in its judgment seem wise. In the present case, though it conferred citizenship upon the Indians, it accompanied its grant of the allotments to them with an express provision against their alienation. The difference between the present case and the *Heff* case is this. In the former case Congress expressly renounced its own authority over the Indians, and subjected them to the laws, both civil and criminal, of the state. Here Congress, with equal explicitness, has imposed a restraint upon the alienation of allotments. It is as much the duty of the courts to give effect to the legislative intent in the present case as in the former. See also *U. S. v. Sutton*, 215 U. S., 291.

The grant of citizenship to the members of the Five Nations, was intended for their protection, and not to strip them of the protection of the national government. It was, in our judgment, never the intent of Congress to deprive itself of the authority which it had always exercised to adopt such measures as in its judgment were wise for the protection of the Indian in his rights among the more highly developed members of the white race. Conceding the Indians to be citizens of the United States and of the state of their residence, this court still said in the case of *United States v. Thurston County*, 143 Fed., 287, 288; "Their civil and political status, however, does not condition the power, authority or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to

execute every trust with which it is charged for their benefit. They are still members of their tribes and of an inferior and dependent race." Clothing them with citizenship did not change their character or invest them with full industrial capacity. These records are eloquent on that subject. An intent to destroy the authority of the national government to protect the Indian, ought not to be deduced as a mere speculative inference from the definition of citizenship. Such a radical change of national policy should emanate only from express and unequivocal language.

Section 1 of the act of May 27, 1908, removes all restraints upon alienation as to several classes of allotments. Section 6 of that act provides for the appointment of representatives of the secretary of the interior to counsel and advise Indian allottees having restricted lands, with reference to the same, and also authorizes these agents to bring suits in the name of the allottee to cancel and annul any conveyance or encumbrance thereof made in violation of any act of Congress. These provisions standing alone, would afford a strong implication against the right of the government to maintain these suits in its own name as to lands that are freed from restriction by section 1. The Indian as a citizen of the United States has a clear right to maintain any suit necessary to set aside illegal conveyances of his property. By Section 1 of the act he is vested in certain cases with an unrestricted right to dispose of his allotment. How can the Attorney General contend that as to lands thus freed from restriction by the government he is truthfully representing its present policy by prosecuting these suits in its name? Again, it might well be urged that, inasmuch as Congress has authorized the agents of the secretary of the interior to maintain suits in the name of allottees to cancel any instrument executed in violation of law, it has thereby indicated its intent that no other governmental agency should institute such suits. These contentions, in our judgment, would be controlling were it not for the last paragraph of Section 6 of the act. It reads as follows:

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit, and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof."

73 "Nothing in this act" includes the provisions from which the implication is drawn against the right of the government to maintain these suits. The later language of the paragraph extends that right to all conveyances which "have been made contrary to law with respect to said lands prior to the removal therefrom of restrictions upon the alienation thereof." According to the averments of the bills, every conveyance here involved falls clearly within these words. To deny the right of the government to main-

tain these suits is to repudiate the plain language and manifest object of the paragraph which we have quoted. The Indians and their lands were subject to the supervision of the secretary of the interior, and the act provides that the suits shall only be brought on his recommendation. The power of Congress to confer such an authority is beyond question. Whether the suits should be brought presents a question of administrative rather than judicial discretion. If Congress saw fit to reinvest allottees with a clear title to their allotments before freeing them from restraint by section 1 of the act, that is clearly a subject with whose wisdom the courts cannot interfere. It is our duty to give effect to the intent of Congress as declared by the statute. The Supreme Court in the case of *United States v. Celestine*, 215 U. S., 278, again enforces the duty of the courts to construe legislation of Congress in relation to the Indians so as to promote their interest. Applying that canon, we entertain no doubt of the right of the government to maintain these suits. They are brought in the name of the United States to enforce a right created by federal law. The jurisdiction of the Circuit Court is therefore plain.

Is there a defect of parties? The rule as to parties in equity was early stated by Mr. Justice Curtis in language so accurate and comprehensive that it has since been accepted by all federal courts. He says that parties are: "1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, 17 How., 129, 139.

The Supreme Court in *Waterman v. Canal Louisiana Bank Co.*, 215 U. S., 33, 49, after quoting the above language with approval, condenses the rule as to indispensable parties as follows: "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between
74 the parties actually before the court, without injuriously affecting the rights of such absent party." That is the real ground of the decision of the Supreme Court in *Minnesota v. Northern Securities Company*, 184 U. S., 199. The decree there could not be enforced against the Northern Securities Company without destroying the rights of the Northern Pacific and Great Northern Railroad Companies, and their stockholders, who were not parties. See also *Rogers v. Penobscott Mining Co.*, 154 Fed., 615. The allottees in the present case do not come within the class of indispensable

parties as thus defined. The cause of action set up in the bill is not theirs but the government's. True, if the government succeeds their titles will be cleared of clouds; but if it does not succeed, they will be left with their personal causes of action unaffected by what is done in the present litigation. It may be said that this very fact makes the presence of the allottees necessary to complete justice to the defendants. While the measure of justice in their favor would be more complete if the allottees were present, that fact does not render the allottees indispensable parties. It is not the mere convenience of the parties before the court which renders absent parties indispensable, but the protection of the rights of those absent parties. Looking at the entire litigation, justice to the defendants will also be promoted by this practice. The Indians have already parted with their lands by deed. While they have the legal right to assail the conveyances if they were made in violation of the statute against alienation, the exercise of that right by the Indians after a decision against the government in the present suit, is so problematical that it would be oppressive to compel the plaintiff to bring all allottees before the court, and would also add unnecessarily to the costs of the defendants in case the suits shall go against them. Again, the allottees, if present, would have no control over the suits. Their consent to a judgment in favor of the defendants would not defeat the right of the government. In our judgment, therefore, there is no defect of parties.

The defense of multifariousness is without merit. That defense, as the Supreme Court has frequently declared, is "very largely a matter of convenience." *United States v. Bell Telephone Co.*, 128 U. S., 315, 352; *Graves v. Ashburton*, 215 U. S., 331, 335. It is addressed to the sound discretion of the court. The convenience both of the defendants and the government is conserved by joining in one action all such conveyances as the government claims are invalid because made in violation of a specific statute.

Only one question remains for consideration. The statutes imposing restraints upon alienation were changed from time to time between the year 1893, when the allotment of the lands in severalty began, and the time of their completion some fifteen years later. It is earnestly contended by the defendants that after allotments had been made subject to a specific limitation, the government was without power to enlarge the period of that limitation; that the Indian obtained a vested right in his allotment, subject only to the
75 restriction which was imposed upon it at the time the allotment was made, and that to enlarge the period of the restriction would be an impairment of his vested rights, in violation of the 14th Amendment to the Constitution. So long as the lands were held by the Indian allottee, or by an Indian who claimed under him by inheritance, we do not think this contention is sound. The grant of citizenship to the Indian did not destroy the right of the federal government to regulate and restrict his use of these lands. Though a citizen of the United States, he did not cease to be an Indian, and both he and his property remained subject to the national government. Congress has from time to time asserted this au-

thority, and to hold that its enactments in that regard are unconstitutional, would be disastrous to the Indian, and would probably still further confuse the already complicated title to lands in Oklahoma. The extension of the period of restriction under the general allotment act is referred to with approval in *U. S. v. Celestine*, 215 U. S., 291. It is, of course, true that conveyances of allotments to third parties in accordance with the law in force at the time the conveyances were made, could not be impaired by subsequent legislation on the part of Congress enlarging the period of restriction against alienation.

The whole scheme of allotment of lands in severalty to the Indians is an experiment. Congress, in the case of the Five Nations, has attempted to reserve to itself power to deal with the subject in the light of experience. If the plan proves a failure, after a fair trial, it would be disastrous, indeed, if the mere grant of citizenship to the Indian had placed him beyond the power of the federal government to adopt such measures for his welfare as experience should show to be necessary.

The decrees are reversed, and the trial court is directed to proceed with the suits in accordance with the views here expressed.

Filed June 8, 1910.

ADAMS, *Circuit Judge*, dissenting:

I am unable to agree with my associates that the United States can of its own motion without the request or consent of the Indians whose rights are involved maintain these suits to remove a cloud from their title. When the suits were instituted the individual Indians held title in fee simple absolute to their several allotments. The undivided interests which they originally owned in tribal property had been effectually partitioned in the process of allotment provided by the act of March, 1893, and subsequent acts supplemental thereto. Any reversionary interest of the United States dependent upon possible abandonment of the land or extinction of the tribe had been relinquished.

The United States, therefore, had no proprietary right legal or equitable to protect or safeguard by suit or otherwise. Moreover, the Indians had become citizens of the United States and of the State of Oklahoma and had become entitled to all the rights, privileges and immunities of such citizens. As a result of all these things guardianship of the Government over them had ceased and the Indians had become completely emancipated from federal control. Laws restricting alienation, hereafter referred to, had been passed for their protection, but this fact does not militate against the completeness of their emancipation. *Matter of Heff*, 197 U. S., 488.

With no title legal or equitable to protect, and no duty of a trust character to perform, a new head of equity jurisdiction had to be discovered to justify the maintenance of these suits by the Government; and this, it is claimed, is found in the obligation of the government to enforce a great National policy. The *Debs* case, 158 U. S. 564, and others of that character are cited in support of this discovery; but they do not as I understand them justify Govern-

mental intervention, in behalf of private citizens except in the discharge of duties entrusted to the care of the Nation by the Constitution. The intervention of the Government in the Debs case appears to be justified on the ground that power over interstate commerce and the transportation of the mails was vested in the National Government by the Constitution. Conceding, however, without admitting, that the Government may intervene as complainant to redress the wrongs of a limited number of citizens arising out of matters not committed to its control by the Constitution, I think the National policy with respect to the Five Civilized Tribes is entirely inconsistent with the right or duty of the United States to institute suit in its own name for their benefit. The majority opinion dwells largely upon that part of the Indian policy which prevailed before the cessation of the National guardianship, that part of it which concerned the treatment of the Indians before emancipation when a duty rested upon the Government to protect them and prepare them for citizenship; but that time and that duty have passed away. Congress in its wisdom has determined that the Indians of the Five Civilized Tribes are now fit for citizenship and qualified to perform its duties and carry its responsibilities. It has accordingly modified its former policy to meet the new conditions. It has endowed the Indians with rights and responsibilities intended and calculated to develop self-reliance, independence and thrift. Citizenship has been conferred upon them and title to lands in fee simple has been vested in them with the expectation that the responsibilities incident thereto: the defense of their rights, the redress of their wrongs, the establishment of homes, the support of themselves and their families and generally speaking, the practice of the arts of civilized life may aid them in their social and economic development. In view doubtless of the cupidity of men and of their own natural improvidence Congress with a view of encouraging and aiding them in their upward progress enacted (35 Stat. 312) that "All allotted lands of enrolled fullbloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April 77 twenty-sixth, nineteen hundred and thirty-one" except by permission of the Secretary of the Interior.

The foregoing considerations, in my opinion, indicate that Congress has adopted a new policy concerning these Indians, namely: the promotion of self-reliance, self-respect, economy and thrift, and to this end after making the special provision above indicated and perhaps others of like character, has left them otherwise subject to general laws governing all citizens. Equality of opportunity is all an American citizen ought to demand; and this and more in the respects just indicated Congress has given the members of the Five Civilized Tribes. With these special provisions made in their behalf the legislative intent and purpose seems to have been to leave them to justify their right to citizenship by coping with other citizens in the affairs of life on an equal footing without the expectation or hope of other special Governmental intervention. Such intervention in the

way of institution of suits at wholesale as done in these cases without the request or consent of the Indians is not only humiliating in itself but tends to defeat the true National policy by discouraging self-reliance and independence of action.

The policy of encouraging and aiding the Indians to act for themselves independently, rather than of aggressively interfering without their consent, to assert their statutory rights is distinctly recognized if not commanded in Sec. 6 of the act of May 27, 1908, above cited. Sec. 1 of that act as already pointed out imposes certain restrictions upon the alienation of lands by the Indians. Sec. 6 after authorizing the Secretary of the Interior or his representatives to take special interest in behalf of minors under guardianship enacts that: "said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and *at the request of any allottee* having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, *in the name of the allottee*, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands."

Notwithstanding other provisions of the act, referred to in the opinion of the majority, I think the part just quoted manifests a clear legislative intent and purpose that the United States by and through the Secretary of the Interior should act with respect to the violation of restrictions primarily in an advisory way and instead of ever bringing suits in its own name at pleasure, should bring
78 them only when requested by allottees and then only in their names.

If these suits can be maintained it is not apparent where the Government can stop in its litigation in behalf of private persons in the enforcement of National policies. There are certainly many recognized policies besides the Indian policy which might be materially subverted by the practice of Governmental intervention as in this case. Where would it end?

In my opinion the judgment below should be affirmed.

Filed June 8, 1910.

And on the eighth day of June, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term,
1910.

WEDNESDAY, June 8, 1910.

No. 3162.

THE UNITED STATES OF AMERICA, Appellant,

vs.

JOHN F. MCCLELLAN et al.

Appeal from the Circuit Court of the United States for the Eastern
District of Oklahoma.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court with directions to proceed in accordance with the views expressed in the opinion of this court.

JUNE 8, 1910.

(Petition of Appellees for a Rehearing.)

And on the thirteenth day of July, A. D. 1910, a petition of appellees for a rehearing was filed in said cause, in the words and figures following, to-wit:

80 United States Circuit of Appeals, Eighth Circuit.

No. 3150.—United States, Appellant, v. James P. Allen et al.

No. 3151.—United States, Appellant, v. N. E. Patterson et al.

No. 3152.—United States, Appellant, v. Charles E. McPherrin et al.

No. 3153.—United States, Appellant, v. F. B. Severs et al.

No. 3154.—United States, Appellant, v. Wilson Bruton et al.

No. 3155.—United States, Appellant, v. Norman Pruitt et al.

No. 3156.—United States, Appellant, v. James Jefferson et al.

No. 3157.—United States, Appellant, v. J. J. Creamer et al.

No. 3158.—United States, Appellant, v. Felix R. Philips et al.

No. 3159.—United States, Appellant, v. J. M. Dickenson et al.

No. 3160.—United States, Appellant, v. James P. Allen et al.

No. 3161.—United States, Appellant, v. Walter F. Nichols et al.

No. 3162.—United States, Appellant, v. John F. McClellan et al.

No. 3163.—United States, Appellant, v. Alfred P. Goat et al.

No. 3265.—United States, Appellant, v. George C. Crump et al.

No. 3276.—United States, Appellant, v. C. J. Benson et al.

No. 3279.—United States, Appellant, v. J. O. Davis et al.

Petition for Re-hearing.

The appellees in each of the above and foregoing causes respectfully petition this court to set aside the order of reversal herein and grant to them and each of them a re-hearing for the following reasons, to-wit:

First. This court erred in holding that the Circuit Court of the United States had jurisdiction over the subject matter of controversy involved in the various actions.

Second. This court erred in holding that the United States had capacity to bring and maintain these suits in the Circuit Court of the United States.

Third. This court erred in holding that the United States may bring and maintain these suits to enforce a supposed policy.

Fourth. This court erred in holding that the citizenship conferred upon the members of the Five Civilized Tribes did not destroy the right, if it ever existed, of the United States to bring and maintain suits for the individual property of such citizens without their knowledge or consent and without making them a party to such action.

81 Fifth. This court erred in holding as follows: "If these Indians may be divested of their lands, they will be thrown back upon the nations, a pauperized, discontented and possibly belligerent people. To prevent such results the United States may invoke the aid of its courts."

Sixth. This court erred in holding that the United States may maintain an action in equity to determine the validity of the conveyances involved, and that such action is not binding upon the owner of the land and would afford no protection to the defendant in this suit in a subsequent proceeding instituted by the allottee.

Seventh. This court erred in determining and establishing a policy for Congress in relation to the allotment of the lands of the Five Civilized Tribes of Indians.

Eighth. That the court, as evidenced by its opinion, wholly misapprehends the conditions existing with reference to the allotment of lands to the members of the Five Civilized Tribes of Indians.

Argument.

No effort will be made to discuss separately the reasons set forth why the petition for re-hearing herein should be granted; nor is it proposed to cover those grounds specifically covered in the briefs filed on behalf of the various appellees. It is deemed desirable to discuss some of the views promulgated and results declared in the majority opinion and the necessary results that will flow therefrom in an endeavor to establish that the result of the conclusions will be destructive of the principles of equity jurisprudence and impairment of the rights of citizenship, state and national, and an establishment of a control heretofore unheard of the rights privileges and immunities of citizens.

As we interpret the opinion of the court, it is held:

1st. That the allottees of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges and immunities of such citizenship.

2nd. That the United States has neither a legal nor an equitable estate in the lands involved.

3rd. That the jurisdiction of the trial court is sustained upon the ground that the United States may invoke such jurisdiction for the enforcement of its policy.

4th. That if the Indians may be divested of their lands they will be thrown back upon the nation, a discontented, pauperized, and possibly war-like people.

5th. That a violation or disregard of a law of the United States authorizes the maintenance of an action in the name of the United States to enforce its policy to see that its laws are observed.

6th. "That Congress by its own declaration could have placed that question [of jurisdiction or right to maintain suits] beyond controversy and the courts ought not to give a meaning to its acts which would make of them a mere squandering of public funds."

82 7th. That the negative declaration contained in the Act of May 27th, 1908, is equivalent to affirmative legislation.

8th. That the appellees may be required to litigate with the United States all of the questions involved and that the result of such litigation is neither *res judicata*, nor the slightest protection to them in any suit that may be instituted by the allottees upon the same cause of action asserted by the United States.

Jurisdiction Founded Upon Policy.

It is stated in the opinion that to prevent the results therein described United States may invoke the aid of its courts, and "That question was put to rest in the decision of *In re Debbs*, 158 U. S. 564."

It is respectfully submitted that the decision of the Supreme Court of the United States *In re Debbs* affords no precedent for maintaining jurisdiction in the cases at bar. One of the governmental functions of the United States is the transportation of its mails. That function bears no relation whatever to the personal and individual transactions involved in this litigation. The prompt and efficient transportation of the mails is both a duty of the government and a burden assumed by it. Such a duty is imposed by numerous statutes and established by generations of usage. It is a duty to the public, the whole nation—a governmental function. It is not a governmental function to bring a suit against one citizen in favor of another, nor does it bear any resemblance thereto.

But it is said that the possibility of the Indians becoming pauperized and discontented and possibly war-like, affords grounds to invoke the jurisdiction of the court. The parties on whose behalf these suits are brought are citizens and residents of the State of Oklahoma. The burden of caring for these citizens of the State of Oklahoma, if they become pauperized, is upon the state and not upon the nation. If it is a governmental function to pacify the discontented, that function would perhaps rest on the State of Oklahoma and not the national government. The matter of maintaining peace within the boundaries of the State of Oklahoma is with the State of Oklahoma and not with the national government. If a theoretical policy may confer jurisdiction or authorize the maintenance of a suit, is not the State of Oklahoma, under the reasoning of the court, the proper party to maintain these actions?

But it is submitted that the court has fallen into error in not distinguishing between the discharge of a governmental function and intermeddling in controversies between its citizens. It is said that if the government's interest in its measures, meaning, we presume, laws, does not give it a standing in court, then the violation of those measures (laws) must go wholly without redress. No reason is urged to sustain the statement. In a subsequent part of the opinion it is

held that the allottee may bring a suit to accomplish the identical results sought to be accomplished by these suits. May the court indulge in a presumption that he will not do so, and in that event the United States must do so, and because the United States must do so that forsooth the court has jurisdiction? It is not believed that jurisdiction founded upon such grounds can be properly sustained.

83 It is said in another part of the opinion, "Congress by its own declaration could have placed that question beyond controversy." * * * Let it be conceded that Congress declined so to do. Is not the very fact that Congress has declined, after its attention has been called to the matter, to place the jurisdiction beyond controversy the very strongest evidence that Congress did not intend the exercise of such jurisdiction?

It is said that the trial court used a dangerous standard of interpretation when it considered what Congress refused to do. Does not the interpretation adopted by this court give much more effect to the non-action of Congress than does the opinion of the trial court? The United States can invoke jurisdiction of its courts only when authorized by law so to do. No statute has been found authorizing the maintenance of these suits. This court finds public policy a source of jurisdiction, although Congress has not directly or indirectly said so.

It was insisted in the trial court that public policy conferred jurisdiction. The trial court was searching for evidence of that public policy. It was claimed to be found in the action of Congress, but no one was able to point out in what particular action. Might not the trial court properly consider the fact that Congress' attention was called to the assertion of jurisdiction and that it was invited to declare the existence of the same, and that it did not do so, in determining whether or not Congress had conferred such authority? Was not the failure to confer jurisdiction upon request of the department, which asserted its existence, a denial of that request and a denial of the authority asserted? If it was not a denial, was it not a competent matter for consideration in determining the existence of the policy? Is not the opinion of this court in this action based more upon the non-action than upon the affirmative action of Congress? Upon negative declarations rather than upon affirmative declarations? The reasoning of the trial court is criticized for accepting the non-action of Congress as some evidence of the absence of jurisdiction and at the same time a negative declaration is given the force and effect of an affirmative declaration?

Necessary Parties.

This court says "the allottees in the present case do not come within the class of indispensable parties as thus defined. The cause of action set up in the bill is not theirs, but the government's. True, if the government succeeds their title will be cleared of clouds; but if it does not succeed they will be left with their personal causes of action unaffected by what is done in the present litigation. It may be said that this very fact makes the presence of the allottees neces-

sary to complete justice to the defendants. While the measure of justice in their favor would be more complete if the allottees were present, that fact does not render the allottees indispensable parties." This is a novel position. The government has a cause of action and the individual has a cause of action, both based upon one single alleged wrong, and a suit by the government upon this cause of action is not res judicata as against the allottee, and we presume upon the same reasoning a suit by the allottee would not be res judicata against the government. In other words, the net result is that
84 there is a particular public policy which overturns the law of jurisdiction, the law of res judicata, the law with reference to who are indispensable parties, all for the purpose of trying a law suit which accomplishes nothing and binds nobody. The defendants in these law suits may be harrassed as long as appropriation may be made, or until final judgment is rendered and if in their favor they have a fruitless victory, which affords them no measure of protection against future litigation of the same kind. It is asserted that court of equity may, and should, lend its aid to an accomplishment of this purpose.

It seems to us unconscionable to permit the prosecution of these suits with the express declaration in advance that a judgment in favor of the defendants would afford them no measure of protection except against the costs of the particular action; that upon the next day thereafter the government may aid and abet an Indian under the provisions of the Act of May 27th, 1908, to institute a suit in his own name for re-trial of the issues here involved, or he may do so on his own initiative, and as many more as he may see fit to lug in. We most earnestly protest that no court has ever before held to a doctrine of this character; that such a doctrine not only means but invites interminable litigation and denies to one party to such litigation any beneficial result whatever that should arise therefrom.

It is earnestly urged that this court erred in reversing the judgment of the trial court, and that the opinion of the trial court and of the circuit judge, dissenting, are correct interpretations of the law and that a rehearing should be granted and the judgment of the trial court affirmed.

Respectfully submitted,

S. T. BLEDSOE,
For the Various Appellees.

I, S. T. Bledsoe, counsel for appellees in the above causes, do hereby certify that the petition for re-hearing is not interposed for delay and that in my opinion the same is well-founded in point of law.

S. T. BLEDSOE,
Counsel for Appellees.

(Endorsed:) Filed Jul- 13, 1910, John D. Jordan, Clerk.

85

(Order Denying Petition for Rehearing.)

And on the twentieth day of August, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition of appellees for a rehearing in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1910.

SATURDAY, August 20, 1910.

No. 3162.

THE UNITED STATES OF AMERICA, Appellant,

vs.

JOHN F. McCLELLAN et al.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellees.

On Consideration Whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

August 20, 1910.

(Stipulation to Vacate Order Denying Petition for Rehearing, etc.)

And on the thirty-first day of August, A. D. 1910, a stipulation to Vacate the order denying the petition for a rehearing, etc., was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

* * * * *

No. 3162.

UNITED STATES, Appellant,

vs.

JOHN F. McCLELLAN et al.

* * * * *

86

Stipulation.

It is stipulated that the order denying the petition for re-hearing heretofore entered in the above causes be set aside, and that the

further consideration of said petition for re-hearing be postponed until the 17 day of October, 1910. That on said date the court may act upon said petition for re-hearing without any of the parties thereto being further heard thereon, it being understood that the court will on said date deny said petition for rehearing.

It is the purpose of this stipulation to keep said decree open until said time in order that the appellees may, if they desire, prosecute an appeal therefrom in open court to the Supreme Court of the United States, in the event that certain stipulations now under consideration relating to the disposition of said causes and the remanding of these and certain additional causes of like character pending in this court, known as the "Indian Land Cases," be not agreed to before said date.

A. N. FROST,
Special Ass't to Att'y Gen'l.
S. T. BLLEDSON,

For Appellees in Petition for Rehearing.

(Endorsed:) United States Circuit Court of Appeals. No. 3150—United States, Appellant, v. James P. Allen, et al., Appellees. Also Nos. 3151, 3153, 3154, 3155, 3156, 3157, 3158, 3159, 3160, 3161, 3162, 3265, 3276, 3279. Stipulation. Filed Aug. 31, 1910, John D. Jordan, Clerk.

(Order Vacating Order Denying Petition for Rehearing, etc.)

And on the 31st day of August, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order vacating the order denying the petition for rehearing, etc., in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1910.

WEDNESDAY, August 31, 1910.

* * * * *

87

No. 3162.

UNITED STATES, Appellant,
vs.

JOHN F. McCLELLAN et al.

* * * * *

On this, the 31st day of August, 1910, the same being a day of the regular May 1910 term of this court, came on to be heard the application to set aside and vacate the order denying the petition for re-hearing in each of the above causes pursuant to the stipulation this day filed therein. After hearing said application and considering said stipulation,

It is ordered that the orders heretofore entered denying the petition for re-hearing as to each of said causes be and the same are hereby vacated and set aside; and it is further

Ordered that the further consideration of said petition for re-hearing be and the same is hereby postponed until the 17th day of October, 1910, in open court, at St. Paul in the state of Minnesota, all pursuant to said stipulation.

WALTER H. SANBORN.
WILLIS VAN DEVANTER.

(Stipulation for Order Denying Petition for Rehearing.)

And on the twenty-sixth day of January, A. D. 1911, a stipulation for an order denying the petition for a rehearing was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3162.

THE UNITED STATES OF AMERICA, Appellant,
vs.

JOHN F. McCLELLAN et al.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

88 It is hereby stipulated and agreed by and between the parties to the above entitled cause that the petition for rehearing in this cause may now be finally disposed of.

Dated January 26, 1911.

A. N. FROST,
Counsel for Appellant.
JOSEPH C. STONE,
Counsel for Appellees.

(Endorsed:) No. 3162. United States vs. John F. McClellan, et al. Stipulation for order denying petition for rehearing. Filed Jan. 26, 1911, John D. Jordan, Clerk.

(Order Denying Petition for Rehearing.)

And on the twenty-sixth day of January, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition for a rehearing in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1910.

THURSDAY, *January 26, 1911.*

No. 3162.

THE UNITED STATES OF AMERICA, Appellant,
vs.
JOHN F. McCLELLAN et al.

Appeal From the Circuit Court of the United States for the Eastern District of Oklahoma.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellees and the stipulation with reference thereto.

On Consideration Whereof, and in pursuance of said stipulation, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

January 26, 1911.

89 (*Petition for Appeal to the Supreme Court U. S.*)

And on the twenty-sixth day of January, A. D. 1911, the petition for an appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 3162.

THE UNITED STATES OF AMERICA, Appellant,
v.
JOHN F. McCLELLAN et al., Appellees.

Petition for Appeal.

P. E. Heckman and Robert L. Owen, appellees in this cause in this court, feeling themselves aggrieved by the order and judgment of reversal made and entered therein on the 8th day of June, 1910, at a day of the 1910 May term of this court, do hereby in open court pray an appeal from said order and judgment to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith; and that a transcript of the record and proceedings upon which said order and judgment is based, duly authenticated, may be sent to the Supreme Court of the United States, and

your petitioners further pray that a proper order touching the security to be required of them to perfect this appeal be made.

N. A. GIBSON,
S. T. BLEDSOE,
C. B. McCRORY,
GEO. S. RAMSEY,
JOSEPH C. STONE,

Attorneys for P. E. Heckman and Robert L. Owen.

The above appeal allowed in open court, this 26th day of January, 1911.

WILLIAM C. HOOK,
Presiding Judge.

90 (Endorsed:) No. 3162. In the U. S. Circuit Court of Appeals for the Eighth Circuit. The United States, Appellant, v. John F. McClellan, et al., Appellees. Petition for Appeal. Filed Jan. 26, 1911, John D. Jordan, Clerk. N. A. Gibson, S. T. Bledsoe, C. B. McCrory, Geo. S. Ramsey, Joseph C. Stone, Attorneys for certain Appellees.

(Assignment of Errors on Appeal to Supreme Court U. S.)

And on the twenty-sixth day of January, A. D. 1911, an assignment of errors on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 3162.

THE UNITED STATES OF AMERICA, Appellant,
v.

JOHN F. MCCLELLAN et al., Appellees.

Assignment of Errors.

P. E. Heckman and Robert L. Owen, two of the appellees in the above entitled cause, respectfully assert and show to the court that in the opinion and judgment of this Honorable Court in the above cause reversing the judgment of the trial court, the following errors were committed to their prejudice:

First. The court erred in holding that the United States had such interest as would authorize a maintenance of this suit in the Circuit Court of the United States.

Second. The court erred in holding that the United States had the capacity to bring and maintain this suit in a Circuit Court of the United States.

Third. The court erred in holding that the Circuit Court of the

United States had jurisdiction over the subject matter in controversy involved in this action.

91 Fourth. The court erred in holding that the conferring of national and state citizenship upon members of the Five Civilized Tribes was not inconsistent with and prohibitive of the right of the United States to bring and maintain suits for the alleged recovery of or removal of a cloud upon the title of the individual property of such citizens without their knowledge or consent and without making them parties to the suit.

Fifth. That the court erred in not holding that the allottees or heirs on whose behalf this suit is brought were indispensable parties.

Sixth. The court erred in holding that there is a policy of the government of the United States which authorizes the commencement and maintenance of this suit.

Seventh. The court erred in holding that the United States can maintain this suit in their own right and that therefore judgment in this action would not be *res judicata* as against proceedings instituted by the allottees in their own names to recover the same tract or parcels of land.

Eighth. That the court erred in holding as follows: "If these Indians may be divested of their lands, they will be thrown back upon the Nation, a pauperized, discontented, and possibly, a belligerent people. To prevent such results the United States may invoke the aid of its courts."

Ninth. The court erred in reversing the judgment of the trial court without having first determined that the lands sued for were subject to restrictions upon alienation.

Tenth. That the court erred in not holding that the bill was multifarious and erred in holding that the convenience of the defendants is conserved by joining all in one action.

Eleventh. The court erred in holding that the grant of citizenship, state and national, left the Indians and their property subject to the control of the national government.

Twelfth. The court erred in holding that Congress could enlarge or external restrictions upon alienation.

92 Thirteenth. That the court erred in reversing the judgment of the trial court.

Fourteenth. The court erred in holding that the conveyances of sale were made in violation of law.

That all of said errors were prejudicial to the rights of the appellees. They therefore pray that the judgment of the Circuit Court of Appeals be reversed and that the judgment of the trial court be affirmed.

N. A. GIBSON,
S. T. BLEDSOE,
C. B. McCORRY,
GEO. S. RAMSEY,
JOSEPH C. STONE,

*Solicitors for P. E. Heckman and Robert L. Owen,
Appellees in this Court.*

(Endorsed:) No. 3162. In the U. S. Circuit Court of Appeals for the Eighth Circuit. United States, Appellant, v. John F. McClellan, et al., Appellees. Assignment of Errors. Filed Jan. 26, 1911, John D. Jordan, Clerk. N. A. Gibson, S. T. Bledsoe, C. B. McCrory, Geo. S. Ramsey, Joseph C. Stone, Attorneys for Appellees.

(Bond on Appeal to Supreme Court of the United States.)

And on the twenty-sixth day of January, A. D. 1911, a cost bond on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 3162.

THE UNITED STATES OF AMERICA, Appellant,

v.

JOHN F. MCCLELLAN et al., Appellees.

Cost Bond on Appeal.

Know all men by these presents: That we, P. E. Heckman and Robert L. Owen, as Principals, and Southern Surety Company, a Corporation, as Surety, are held and firmly bound unto the
93 United States of America in the full and just sum of Five Hundred (\$500) Dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors, jointly and severally by these presents.

Sealed with our seals and dated this the 26th day of January in the year of Our Lord, One Thousand Nine Hundred and Eleven.

Whereas, lately, at the May 1910 term of said Court, in a suit pending therein on appeal from the Circuit Court of the United States for the Eastern District of Oklahoma, between the United States, Appellant, and John F. McClellan and others, Appellees, the judgment of the trial court was reversed, and,

Whereas, the said P. E. Heckman and Robert L. Owen have prayed for and obtained in open court an appeal from said judgment of reversal to the Supreme Court of the United States in the aforesaid suit.

Now, the condition of this obligation is such that if the said P. E. Heckman and Robert L. Owen shall prosecute said appeal to effect and answer all costs if they fail to make good their plea, then the

above obligation to be void, otherwise to remain in full force and effect.

P. E. HECKMAN,
ROBERT L. OWEN,
Principals,

By JOSEPH C. STONE,
His Attorney.

SOUTHERN SURETY
COMPANY, *Surety.*

E. G. DAVIS, *Secretary.*

[SEAL.]

Witnesses:

C. B. MCCRORY,
Muskogee, Okla., Post Office.
CHARLES F. EICHENAUER,
Muskogee, Okla., Post Office.

Witnessed for Surety:

GENEVA OWENS,
760 Boston St., Muskogee, Okla.
RUTH F. DAVIS,
Muskogee, Okla.

94 The foregoing bond is hereby approved this 26th day of January, 1911.

WILLIAM C. HOOK,
*Presiding Judge of the United States Circuit
Court of Appeals, Eighth Circuit.*

STATE OF OKLAHOMA,
Muskogee County, ss:

We, C. S. Cobb, President, and E. G. Davis, Secretary, of Southern Surety Company, a corporation organized and existing under the laws of Oklahoma, do hereby certify that the following is a true and correct copy of a Resolution duly adopted by the Board of Directors of said Company at a meeting held on the 11th day of May, 1907, to-wit:

Resolved that the Company do and it hereby does authorize and empower its President, or any one of its Vice Presidents, or its Secretary or Assistant Secretary, under its corporate seal, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies, and executing and guaranteeing bonds and undertakings required or permitted in all actions or proceedings, or by law allowed.

Witness our hands and the corporate seal of said Company, this 24th day of January, 1911.

C. S. COBB, *President.*

[SEAL.] Attest:

E. G. DAVIS, *Secretary.*

Subscribed and sworn to before me the day and year last above written.

[SEAL.]

ROSE HAMBLIN,
Notary Public.

My Commission Expires April 8th, 1913.

(Endorsed:) No. 3162. In the United States Circuit Court of Appeals for the Eighth Circuit. United States of America, Appellant, v. John F. McClellan, et al., Appellees. Cost Bond on Appeal. Filed Jan. 26, 1911, John D. Jordan, Clerk.

95 (*Order Approving Bond on Appeal to Supreme Court, U. S.*)

And on the twenty-sixth day of January, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order approving the bond on appeal to the Supreme Court of the United States in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1910.

THURSDAY, January 26, 1911.

No. 3162.

THE UNITED STATES OF AMERICA, Appellant,
v.

JOHN F. MCCLELLAN et al., Appellees.

Order Approving Bond.

On the 26th day of January, 1911, the same being a day of the regular 1910 December term of this court, P. E. Heckman and Robert L. Owen, two of the appellees in the above styled cause present their bond for costs on appeal for approval and same having been examined and found to be in accordance with the order of the court the same is hereby approved.

(Signed)

WILLIAM C. HOOK,
*Presiding Judge of the United States Circuit
Court of Appeals, Eighth Circuit.*

(*Order Allowing Appeal to Supreme Court, U. S.*)

And on the twenty-sixth day of January, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order allowing an appeal to the Supreme Court of the United States in said cause, in the words and figures following, to-wit:

96 United States Circuit Court of Appeals, Eighth Circuit,
December Term, 1910.

THURSDAY, January 26, 1911.

No. 3162.

THE UNITED STATES OF AMERICA, Appellant,

v.

JOHN F. MCCLELLAN et al., Appellees.

Order Allowing Appeal.

Or this the 26th day of January, 1911, the same being a day of the regular 1910 December term of this court, the prayer of P. E. Heckman and Robert L. Owen, two of the appellees in this cause in this court, made in open court, for an appeal from the order and judgment of reversal herein to the Supreme Court of the United States, and for an order fixing the security to be required of him to perfect his appeal, After hearing the same and being duly advised in the premises,

It is hereby ordered that the appeal as prayed for be granted and that the said appellees, P. E. Heckman and Robert L. Owen be required to execute an appeal bond in the sum of Five Hundred (\$500) Dollars, to answer for all costs if he shall fail to make good his plea, with sureties to be approved by this court or a judge thereof.

WILLIAM C. HOOK,
*Presiding Judge United States Circuit
Court of Appeals, Eighth Circuit.*

97

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals, in a certain cause in said Court wherein The United States of America is Appellant, and John F. McClellan, et al., are Appellees, No. 3162, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this thirtieth day of January, A. D. 1911.

[Seal United States Circuit Court of Appeals,
Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

98

881/22502.

In the Supreme Court of the United States.

No. —.

HECKMAN AND OWEN, Appellants,

vs.

UNITED STATES OF AMERICA.

*Stipulation for the Omission of Certain Immaterial Parts of the
Record and Printing the Material Parts Only.*

It is hereby agreed by and between the Solicitors for the respective parties to the above entitled cause that the Clerk of this Court prepare and cause to be printed the papers and all endorsements thereon, hereinafter mentioned, including all record recitals with reference thereto, and omitting all others in said transcript included. The part of said transcript so to be printed is described as follows:

1. The entire Bill in Equity in this cause (3).
2. The demurrers of P. E. Heckman and R. L. Owen (17 & 21).
3. Order decree and opinion of Judge Ralph E. Campbell sustaining the demurrers dismissing Bill (23 & 56).
4. Petition for an order allowing appeal by the United States of America from the Circuit Court (57).
5. Assignments of error filed by the United States of America in the Circuit Court (58).
6. Recital of submission of cause to the Circuit Court of Appeals (64).
7. Copy of decree and Opinion of the Circuit Court of Appeals and of the dissenting Opinion of Judge Adams (66 & 79).
8. Petition for rehearing (80).
9. Order denying petition for rehearing (85).
10. Stipulation to vacate order denying petition for rehearing (85).
11. Order vacating order denying petition for rehearing (86).
12. Second order denying petition for rehearing (88).
13. Assignment of errors filed in the Circuit Court of Appeals by P. E. Heckman and R. L. Owen (90).
14. Petition for appeal by P. E. Heckman and R. L. Owen, and order allowing same (89).

15. Bond on appeal and order approving same (92).
17. Certificate of the Clerk of the Circuit Court transmitting the record to the Circuit Court of Appeals (60).
18. Certificate of the Clerk of the Circuit Court of Appeals transmitting the record to the Clerk of the Supreme Court of the United States (97).
19. This stipulation for the omission of certain immaterial parts of the record, and for the printing of material parts (99).

J. C. STONE,
S. T. BLEDSOE,
Solicitors for Appellants.
F. W. LEHMANN,
Solicitor General for Appellee.

100 [Endorsed:] File No. 22,502. Supreme Court U. S. October Term, 1910. Term No. 881. P. E. Heckman et al., Appellants, vs. The United States. Stipulation to omit parts of the record in printing. Filed February 27, 1911.

Endorsed on cover: File No. 22,502. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 881. P. E. Heckman and Robert L. Owen, appellants, vs. The United States. Filed February 2, 1911. File No. 22,502.

Office Supreme Court, U. S.
FILED.

SEP 23 1911

JAMES H. McKENNEY

CLERK

23

~~NOTHING TO BE FILED HERE, 1911.~~

In the
Supreme Court of the United States

October Term, 1911.

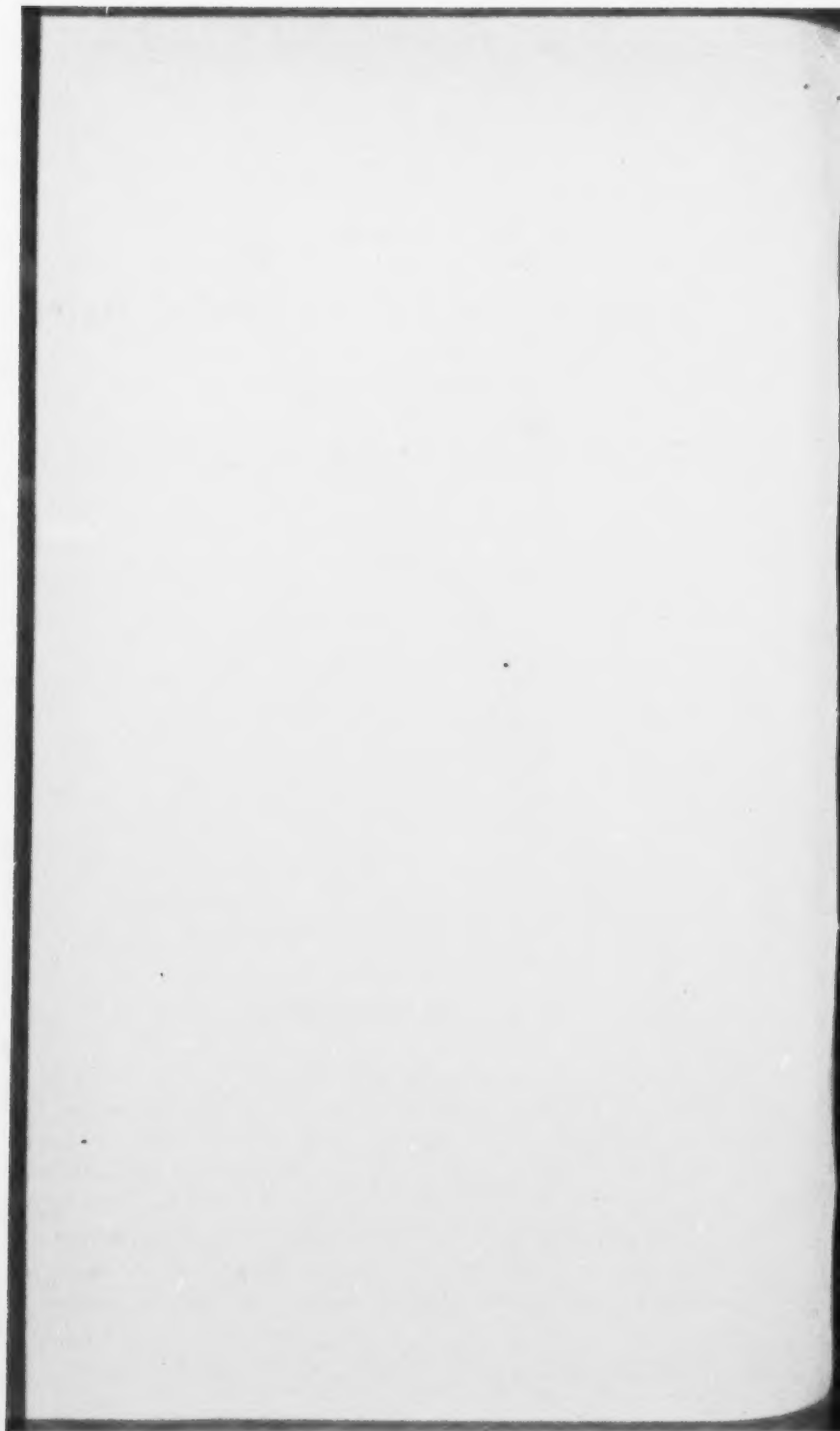
No. 496.

P. E. HECKMAN and ROBERT L. OWEN, *Appellants,*

VS.

THE UNITED STATES, *Appellee.*

BRIEF FOR APPELLANTS.



In the
Supreme Court of the United States

October Term, 1911.

P. E. HECKMAN and ROBERT L. OWEN, *Appellants*,

VS.

THE UNITED STATES, *Appellee*.

No. 881, October Term, 1910.

BRIEF FOR APPELLANTS.

STATEMENT.

On the 1st day of August, 1908, the United States filed their bill in the Circuit Court of the United States for the Eastern District of Oklahoma, styled "*United States of America v. John F. McClellan et al.*," to have canceled, set aside and held for naught various conveyances of parts of their allotments executed by Cherokee allottees, upon the sole ground that such conveyances were made in violation of allotment agreements and laws imposing restrictions upon alienation.

This bill did not charge, nor was it contended, that there was any fraud, deception, duress, inadequacy of consideration or other actionable wrong. (R. 4.)

Persons to the number of ten were made parties defendant (R. 2), but the grantors were not parties either plaintiff or defendant. No one of the defendants is in any manner interested in the conveyances to any of the other defendants.

To this bill various demurrers were interposed.

The objections to the sufficiency of the bill as set forth in the demurrers may be summarized as follows:

That the complainant has no capacity to maintain said suit.

That the bill of complaint is wholly without equity.

That there is a defect of parties.

That there is a misjoinder of alleged causes of action.

That the bill is multifarious.

The cases were submitted to the trial court upon the bill and demurrers (R. 15), and on the 6th day of August, 1909, Honorable Ralph E. Campbell, District Judge, filed an opinion sustaining the demurrers to the bill. (R. 19-42.) Pursuant thereto, on the 13th day of September, 1909, a decree was entered dismissing the bill. (R. 43.) This opinion summarizes in terse language the grounds for the holding of the Circuit Court. It is as follows:

"On this 13th day of September, 1909, on consideration of the demurrers to this bill filed by the various defendants herein, which were heretofore argued and submitted and by the court taken under advisement, the court now finds that the complainant has not such an interest in the matters involved in this cause as entitled it to maintain this action; that the various allottees and patentees of the lands involved in this action are necessary parties thereto, and that there is, therefore, a defect of parties, and that the bill is multifarious.

It is the judgment of the court that for the foregoing reasons the demurrers should be sustained.

It is therefore ordered that the demurrers herein now being considered be sustained, and the bill dismissed at the complainant's costs."

From the decree of dismissal the United States prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit.

This cause, together with sixteen others, was submitted to the United States Court of Appeals on the 7th day of December, 1909. (R. 48.) The court on the 8th day of June, 1910, filed an opinion reversing the judgment of the Circuit Court for the Eastern District of Oklahoma, and remanded the cause to the trial court for further proceedings. (R. 48-58.) Circuit Judge Adams filed a dissenting opinion, sustaining the action of the trial court. (R. 58-60.)

In the meantime Congress, realizing the importance of the questions involved, enacted a law which authorized an appeal from the judgment of the Circuit Court of Appeals direct to this Court from such judgment of reversal. The provision allowing such an appeal is found in Section 3 of an Act entitled "An Act to authorize the Secretary of the Interior to issue a patent to the City of Anadarko, State of Oklahoma, for a tract of land, and for other purposes" (Stats. 61 Congress, 2d Sess., pt. 1, pp. 836-7, Chap. 408). Said section is as follows:

"That an appeal to the Supreme Court of the United States in all suits affecting the allotted lands within the Eastern District of Oklahoma or on demurrers in such suits appealed to the United States Circuit Court of Appeals, Eighth Circuit, is hereby authorized to be made by any of the parties thereto, including appeals from orders reversing judgments of the trial court."

Petition for rehearing was filed in the Circuit Court of Appeals on the 13th day of July, 1910, and was by the court denied on the 26th day of January, 1911.

Pursuant to the Act of Congress allowing an appeal in said cause, the appellants, Heckman and Owen, presented to the Circuit Court of Appeals on the 26th day of January, 1911, in open court and at the term, their petition praying an appeal to this Court, together with their assignments of error. (R. 71-72.) The appeal was duly allowed (R. 75), supersedeas bond presented and approved (R. 75), and the transcript duly lodged in this Court February 2d, 1911.

This case, therefore, is before this Court upon its merits upon all of the issues made by the bill and demurrers.

The Circuit Court of the United States for the Eastern District of Oklahoma dismissed the cause without passing upon the question of whether or not the conveyances assailed were invalid. The Circuit Court of Appeals reversed the judgment of the trial court and remanded the cause without determining whether the grantors in the deeds assailed were prohibited from alienating said lands at the time they were conveyed.

There are fourteen errors assigned to the action of the Circuit Court of Appeals in reversing the judgment. Almost all of the assignments challenge the right of the United States to maintain the action, and this is the principal matter discussed in the brief.

The right of the United States to maintain the bill in the trial court and in the Circuit Court of Appeals was based on the following propositions:

First. The supposed property interest of the United States in the lands involved, arising from the restrictions imposed upon alienation by the allotment agreement and laws enacted subsequent thereto.

Second. Upon the supposed guardianship of the United

States over the persons of the various members of the Five Civilized Tribes.

Third. Upon a supposed public policy.

Fourth. Upon the provisions of the Act of May 27, 1908 (35 Stat. 312).

The trial court denied the contentions of the plaintiff, based upon each and every one of these claims. As we interpret the decision of the Circuit Court of Appeals, it denied the contentions as based upon the first and second grounds above set out; sustained the same upon the third, and concluded that the fourth lent some support to the conclusions arrived at with reference to the third.

We shall insist in this brief:

First. That the United States have no property interest whatever in the lands involved.

Second. That the members of the Five Civilized Tribes are citizens of the United States and of the State of Oklahoma; are not wards of the Government of the United States, or of any other government; that only the allottees themselves may maintain suits to cancel conveyances covering their individual allotments; that there is a defect of parties.

Third. That there exists no such public policy as declared by the Circuit Court of Appeals, and if such policy did exist, it could not operate to confer jurisdiction to entertain a suit at the instance of the United States to cancel the conveyances complained of.

Fourth. That the Act of May 27th, 1908, did not authorize the bringing or maintenance of this suit.

TREATIES AND STATUTORY PROVISIONS AFFECT- ING THE LANDS OF ALLOTTEES IN THE FIVE CIVILIZED TRIBES.

It is necessary to consider the nature and character of the title of the allottees whose lands are involved. To do this we must consider the Laws and Treaties by which each of the Five Civilized Tribes acquired title to the tribal domain, and also the various allotment agreements and statutory provisions under which the tribal lands were allotted in severalty to the individual members of the Tribes whereby the fee simple title was vested in such members.

1. Tribal Titles.

a. Choctaws and Chickasaws.

On the 8th day of October, 1820 (7 Stat. 210), the United States ceded to the Choctaw Nation the tract of country which subsequently constituted the Choctaw and Chickasaw Nations. The cession is in the following language:

"For and in consideration of the foregoing cession, on the part of the Choctaw Nation, and in part satisfaction for the same, the Commissioners of the United States, in behalf of said States, do hereby cede to said Nation, a tract of country west of the Mississippi River, and bounded as follows:" etc.

On the 27th day of September, 1830, the United States entered into another treaty with the Choctaw Tribe or Nation, by the terms of which they ratified the previous cession. (7 Stat. 333.)

In 1837 the Choctaws and Chickasaws, with the approval of the United States, entered into an agreement, by the terms of which the Chickasaws were to have a district in the Choctaw country and the members of each tribe were to have the same interest in the lands of the other tribe as in that of their own. (11 U. S. Stat. 57.) There is, therefore, no distinction, either as to tribal title or the title of the individual allottee, as between the Choctaws and Chickasaws.

By the treaty of 1855 the United States declared that "And pursuant to an Act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw Tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole; provided, however, no part therein shall ever be sold without the consent of both tribes; and the said lands shall revert to the United States if said Indians and their heirs become extinct, or abandon the same." (11 U. S. Stat. 611.)

In 1866 the United States entered into a new treaty with the Choctaws and Chickasaws confirming the grants made in the treaties of 1830 and 1855. (14 Stat. 769.)

The result of these agreements and the grants therein contained was to pass to the Choctaw and Chickasaw Tribes a fee simple title to the lands described, defeasible only on the happening of the contingency mentioned in the proviso, to-wit: "If the said Indians and their heirs become extinct or abandon the lands so granted." At no time since 1830 have the United States had a greater interest in the lands of the Choctaws and Chickasaws than the mere possibility of a reversion. Such was the nature of the title of these two tribes when the negotiations for the allotment of the lands among the members thereof were begun; and it was in recognition of this title that the United States deemed it necessary to secure the consent of the tribes to a division of the tribal lands.

b. Creeks.

On the 14th day of February, 1833, the United States entered into a treaty with the Creeks (7 Stat. 417), which was proclaimed the 12th day of April, 1834. Article 3 of this treaty is as follows:

"The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the lands assigned said Nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

Pursuant to this treaty, on the 11th day of August, 1852, the President of the United States executed a patent to the Creek Nation for the lands therein described. The granting clause of which is as follows:

"Now know ye that the United States of America, in consideration of the premises and in conformity with the above recited provisions of the treaty aforesaid, have given and granted and by these presents do give and grant unto the said Muskogee or Creek Tribe of Indians the tract of country above described. To have and to hold the same unto the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them."

It will be observed that the treaty and grant are substantially identical with the treaty with and grant to the Choctaws and Chickasaws.

On August 7, 1856, another treaty was entered into with the Creeks ratifying and confirming the title conveyed by the patent above referred to.

c. Seminoles.

By Article 1 of the Treaty of 1856, between the United States and Creek and Seminole Tribes of Indians (11 Stat., 699), the Creek Nation by and with the consent of the United States granted, ceded and conveyed to the Seminole Indians a tract of country included within certain described boundaries. The Third Article of the Treaty of 1866, entered into by and between the United States and Seminoles (14 Stat. 755) contained the following grant:

"In consideration of said grant and cession of their lands, estimated at two million, one hundred and sixty-nine thousand and eighty (2,169,080) acres, the United States agree to pay said Seminole Nation the sum of three hundred and twenty-five thousand, three hundred and sixty-two (\$325,362) dollars, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby GRANT to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so GRANTED by the United States to the Seminole Nation are bounded and described as follows, to-wit: Beginning on the Canadian river, where the line dividing the Creek land according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north, to where said line crosses the North Fork of the Canadian river; thence up said North Fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written." * * * * *

(Kappler, Vol. 2, p. 911).

It will be observed, therefore, that there is no limitation of any character upon the grant made to the Seminoles, nor is there any reversionary interest reserved to the United States. It is simply a clear and distinct grant passing an untrammelled fee simple title.

d. Cherokees.

On the 6th day of May, 1828, the United States entered into an agreement with the Cherokee Nation, Article 2 of which contained the following stipulation:

"The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows:" etc.

Subsequently on the 31st day of December, 1838, a patent was issued to the Cherokee Nation conveying said lands and having the following granting clause: "To have and to hold the same, together with all the rights, privileges and appurtenances thereto belonging to the said Cherokee Nation forever. * * * The lands hereby granted shall revert to the United States if the Cherokee Nation becomes extinct or abandons the same."

Dissensions having arisen among the different bands of the Cherokees, a new treaty was made with the United States on August 6, 1846, by Article 1 of which previous grants were ratified and confirmed in the following language:

"That the United States will forever secure and guarantee to them and their heirs or successors, the country so exchanged to them, and if they prefer the United States will cause a patent or grant to be made to them and executed for same; provided, always, that such land shall revert to the United States if the Indians become extinct or abandon the same." (9 Stat. 871.)

The interest of the United States in the Cherokee domain was, therefore, the possibility of a reversion in the event the Cherokee Nation should become extinct or abandon the lands granted. In each case the possibility of the reversion existing in favor of the United States has been not only rendered impossible, but waived by the United States in the clearest and most forcible language. This waiver is in the form of a consent to the allotment of the lands to the members of the tribe and in the vesting in such members an absolute and unqualified fee simple title to the lands selected and received in allotment.

2. Title of Allottees to Individual Allotments.

a. Choctaws and Chickasaws.

The original allotment agreement entered into between the United States and the Choctaws and Chickasaws, known as the Atoka Agreement, became a law as Section 29 of the Act of June 28, 1898 (30 Stat. 495). Before any of the lands of the Choctaws and Chickasaws had been allotted, a Supplemental Agreement was entered into (32 Stat., 641), which dealt with practically the entire subject of the allotment of lands to the members of the Choctaw and Chickasaw Tribes and freedmen. Under Section 11 of this Supplemental Agreement "There shall be allotted to each member of the Choctaw and Chickasaw Tribes, as soon as practicable after the approval by the Secretary of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval of the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable lands of the Choctaw and Chickasaw Nations." * * *

Sections 66 and 68 of this Agreement are as follows:

(66) "All patents to allotments of land, when executed, shall be recorded in the office of the Commission to the Five Civilized Tribes within said nations in books appropriate for the purpose, until such time as Congress shall make other suitable provision for record of land title as provided in the Atoka Agreement, without expense to the grantee; and such records shall have like effect as other public records.

(68) No Act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations."

b. Creeks.

Section 3 of the original Creek Agreement (31 Stat. 861), provided that "All lands of said Tribe, except as herein provided, shall be allotted among the citizens of the Tribe by said commission, so as to give each an equal share of the whole in value as near as may be." * * *

Section 8 of this Agreement is as follows:

"The Secretary of the Interior shall, through the United States Indian Agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided, and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land."

Section 23 of the same Agreement reads in part as follows:

"Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due

form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed.

Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment."

c. Seminoles.

The lands of the Seminoles were allotted under the provisions of the Seminole Agreement (30 Stat. 567), December 16, 1897, providing for a division of the lands of the Seminoles among the members of that tribe. The principal chief last elected by the tribe was required to execute a patent under his hand and the seal of the Nation, conveying to the allottee all the right, title and interest of the said Nation and the members thereof in the lands so allotted; the secretary is directed to approve such deed, and such approval to operate as a relinquishment of the right, title and interest of the United States to the lands conveyed; and the acceptance by the allottee is to operate as a relinquishment of his interest in the lands of the Tribe other than those selected by him in allotment.

d. Cherokees.

Under the provisions of Section 11 of the Cherokee Agreement (32 Stat., 716):

"There shall be allotted by the commission to the Five Civilized Tribes and to each citizen of the Cherokee Tribe, as soon as practicable after the approval by the

Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements."

Sections 58, 59 and 60, relating to the passing of title to Cherokee allottees, are as follows:

(58) "The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate.

(59) All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent.

(60) Any allottee accepting such patent shall be deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in this act, and to relinquish all his right, title, and interest to the same, except in the proceeds of lands reserved from allotment."

All of the above provisions with reference to the allotment of lands of the various tribes should be considered and construed in the light of the previous legislation looking to allotment.

3. Legislation Affecting All Five of the Tribes.

On the 3d day of March, 1893, the President approved an Act of Congress (27 Stat. 645) authorizing the appointment of commissioners

"to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation, and the Seminole Nation for the purpose of extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same, or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other methods as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within the said Indian Territory."

Section 15 of the same Act is as follows (27 Stat. 645):

(15) "The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotment the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

Pursuant to the authority conferred upon this commission to enter into agreements with the Five Civilized Tribes for the allotment in severalty of the lands of such tribes, and that "upon the allotment of the lands held by the said tribes,

respectively, the reversionary interest of the United States therein shall be relinquished and shall cease," negotiations were entered into, resulting in the agreements above quoted from.

It took the commission practically five years to secure the first agreement with one of the Civilized Tribes, and nearly ten years to perfect the agreements with all of the tribes. During all of the time, however, it was the same commission acting under the same authority and pursuant to the legislation by which it was originally created and empowered to act.

It will be observed in each instance that the deed or patent is to be executed by the Governor or Principal Chief, and not by the United States. The deed so executed is executed for and on behalf of the nation in its corporate or public capacity. This is a direct recognition of the fact that the title is in the nation, and not in the United States. If the title were in the United States the grant would be by the United States with the assent of the nation. This distinction is clearly sustained by the fact that wherever the Indians occupy a tribal reservation and the same is allotted to members of such tribes, the patent is executed by the United States, and not by the principal chief of the tribe. There is also a further provision that an acceptance by the allottee of the deed shall operate in effect as a consent upon his part to a division of the tribal lands and the relinquishment of any claim to the lands allotted to other members of the tribe.

In the same connection, in the Seminole, Creek and Cherokee Agreements, the approval of the Secretary is to operate as a relinquishment of the interest of the United States in and to the lands so patented to the allottee. The word "relinquishment" in this connection is clearly used in recognition of an existing right and not as a grant of a new and independent interest in the lands patented. The title to the tribal lands being in the nation, in its corporate capacity, there was nothing for the individual, accepting the allotment and patent from the nation, to grant or convey, by the accept-

ance of the patent on his part, nor did the approval of the patent by the Secretary amount to a grant on the part of the United States.

The term in which the word "relinquishment" is used in this connection is correctly interpreted in the case of *United States v. Joseph*, 94 U. S. 614. In that case this Court had under consideration a provision of the Act of Congress of December 27, 1858 (11 Stat. 374), relating to the Pueblo of Taos in the county of Taos, in which the Commissioner of the Land Office was ordered to "issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said surveyor-general, and cause a patent to issue therefor, as in ordinary cases to private individuals, provided, that this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist."

Discussing this provision and the meaning of the word "relinquishment" contained therein, this Court uses the following language:

"It is unnecessary to waste words to prove that this was a recognition of the title previously held by these people, and a disclaimer by the government of any right of present or future interference, except such as would be exercised in the case of a person holding a competent and perfect title in his individual right."

When the members of each of the Five Civilized Tribes select, as required by the provisions referred to, the lands they desire to take in allotment, and that selection is approved, nothing further remains to be done by such members in order to perfect their title to the lands so selected. The issuance of the allotment certificate and patent which follows are mere ministerial acts. It requires neither allotment certificate nor patent to pass title to the allottee. The provision that "there shall be allotted, etc.," contained in the various agreements

is sufficient when the land is selected and designated to pass title to the allottee without the necessity of certificate or patent.

Wallace v. Adams, 143 Fed. 716.
Jones v. Meehan, 175 U. S. 1, 16.
Doe v. Wilson, 23 How. 457.
Quinney v. Denney, 18 Wis. 485.
Crews v. Burcham, 1st Black. 352.
French v. Spencer, 21 How. 228.
Stark v. Starrs, 6 Wal. 402.
Lamb v. Davenport, 18 Wal. 307.
Ryan v. Carter, 93 U. S. 78.
Best v. Polk, 18 Wal. 112.
Oliver v. Forbes, 17 Kan. 113.
Clark v. Lord, 20 Kan. 390.
Francis v. Francis, 99 N. W. 14, 203 U. S. 233.
United States v. Torrey, 154 Fed. 263.
United States v. Moore, 154 Fed. 712.
New York Indians v. United States, 170 U. S. 1.

Restrictions upon alienation do not vest an interest in the United States or limit a fee simple title.

The mere existence of restriction upon alienation imposed for the protection of the allottee vests no interest whatever in the United States in reversion or otherwise. A violation of the statute imposing restrictions upon alienation does not in any event redound to the interest of the United States or impair the title of the allottee.

In *Libby v. Clark*, 118 U. S. 250, 255, the Court said:

"The title conveyed to Hurr by the patent was a *fee simple*; this is, it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. The restriction on his right to convey did not deprive the title of the character of a *fee simple estate*. 'An estate in the fee simple is where a man has an estate in lands or tenements to him and his heirs forever.' (4 Com. Dig.,

Estates 1.) The limitation on the power of the sale for five years is not inconsistent with the fee simple estate. Such, also, seems to have been the practice of the government in other treaties referred to by counsel in their brief."

In *Schrimscher v. Stockton*, 183 U. S. 290, 299, the Court said:

"Here the United States had issued a patent to Rodgers 'and to his heirs and assigns forever,' subject to a condition, not that the title should revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not redound to the benefit of the United States or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the *title should remain in him*, notwithstanding any alienation that he might make."

The whole estate having vested in the allottee, there could be no possible interest remaining in the United States. Not even a possibility of forfeiture or reversion.

The United States own no property interest upon which to maintain this action, nor may the same be maintained for the protection of citizens, generally, against violations of law.

The sole authority of the Circuit Courts of the United States to exercise jurisdiction over causes where the United States are plaintiffs or petitioners, is given by the Act of August 13th, 1888 (25 Stat. 434). This statute was considered and construed by this Court in the cases of

United States v. Sayward, 160 U. S. 493.

United States v. Payne Lumber Company, 206 U. S. 467,

and by the Circuit Court of the United States in *United States v. Auger et al*, 153 Fed. 671, and *United States v. Paine Lumber Company*, 154 Fed. 263.

This Court has also had occasion to construe the provisions of Section 2, Art. III of the Constitution, conferring original jurisdiction upon *this* Court over "all controversies to which the United States may be a party, and to controversies between two or more states," in the cases of:

- Louisiana v. Texas*, 176 U. S. 1.
- New Hampshire v. Louisiana*, 108 U. S. 76.
- Kansas v. U. S.*, 204 U. S. 331.
- Minnesota v. Hitchcock*, 185 U. S. 373.
- Oregon v. Hitchcock*, 202 U. S. 60.
- U. S. v. Texas*, 143 U. S. 621.
- Oklahoma v. A. T. & S. Fe Ry. Co.*, 31 Sup. Ct. Rep. 434 (Advance Sheets).

We do not consider it necessary to further pursue this phase of the controversy because both the Circuit Court and the Circuit Court of Appeals found that the United States had no such property interests in the subject matter in controversy as to authorize the invoking of the jurisdiction of the Circuit Court of the United States.

We, however, desire to call the Court's attention to a terse, concise and carefully worded statement as to what interest is necessary in order to permit a sovereignty to maintain a suit, the same being a quotation from the opinion delivered by Justice Harlan for the Court in the case of *State of Oklahoma, complainant, v. The Atchison, Topeka & Santa Fe Railway Company, defendant*, decided the 3rd day of April, 1911, and reported in the 31st Supreme Court Reporter, pp. 434-437 (Advance Sheets). The language is as follows:

"We are of opinion that the words in the Constitution conferring original jurisdiction on this Court in a suit 'in which a state shall be a party' are not to be interpreted as conferring such jurisdiction in every cause

in which the state elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or public policy against wrongdoers generally."

And the following quotation from the opinion of this Court, speaking through Justice Harlan in the case of *State of Oklahoma v. Gulf, Colorado & Santa Fe Railway Company*, decided April 3d, 1911, 31 Supreme Court Reporter, pp. 437-441 (Advance Sheets):

"But there is another ground which is equally fatal to the claim that this Court may give the relief asked by an original suit brought by the State. In the provisions of the Constitution relating to the judicial power of the courts of the United States, it is provided, as we have seen, that 'in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction.' In *Oklahoma v. Atchison, T. & S. F. Ry. Co.*, No. 13, Original, just decided (220 U. S. —; *ante*, 434, 31 Sup. Ct. Rep. 434), it was held that a State could not invoke the original jurisdiction of the court, by suit on its behalf, where the primary purpose of the suit was to protect its citizens generally, against the violation of its laws by the corporations or persons sued; that the above words, 'those in which a state shall be a party,' were not to be so interpreted as to embrace suits of that kind."

Judge Amidon, speaking for the majority of the Circuit Court of Appeals in the case at bar (*United States v. Allen*, 179 Fed. 13), uses the following language:

"Turning now to the objections which were made and sustained by the trial court, has the Federal Government such an interest as entitles it to maintain these suits? It will be considered at the outset that it has no legal or equitable estate in the allotments and if such an estate is necessary, it has no standing in court."

We respectfully submit that in this declaration Judge Amidon was correct. That he is supported in his conclusion that the United States have no property interest by reason of the restrictions upon alienation, see the following decisions of this Court:

Libby v. Clarke, 118 U. S. 250-255.

Schrimscher v. Stockton, 183 U. S. 290-299.

U. S. v. Paine Lumber Company, 206 U. S. 467.

The former members of the Five Civilized Tribes are citizens of the United States and the State of Oklahoma, and not wards of either state or national governments.

The conclusions of the Circuit Court of Appeals, as expressed in the opinion of Judge Amidon, are erroneous largely because based upon a want of appreciation of the difference between the advance in civilization made by the members of the Five Civilized Tribes, as compared with blanket Indians, the nature of their tribal title and the character of the individual title acquired by the allottee.

A most careful examination of the opinion of Judge Amidon discloses that he was acting under the presumption that the members of the Five Civilized Tribes were nomadic blanket Indians, at least semi-barbarous, and more than a century of the public history of this tribe is entirely lost sight of.

As early as 1855, this Court in the case of *Mackey v. Cox*, (18 Howard 100, 102-3) said of the Cherokees:

"The Cherokees are governed by their own laws; as a people they are more advanced in civilization than any of the Indian Tribes, with the exception, perhaps, of the Choctaws. By the national council their laws are enacted, approved by their executive, and carried into effect through an organized judiciary. Under a law relative to estates

and administrators,' letters of administration were granted to the persons above named on the estate of Samuel Mackey, deceased, by the Probate Court, with as much regularity and responsibilities as letters of administration are granted by the state courts of the Union. * * * It is refreshing to see the surviving remnants of the races which once inhabited and roamed over this vast country as their hunting grounds, and as the undisputed proprietors of the soil, exchanging their erratic habits for the blessings of civilization."

That the Cherokees continued to progress is evidenced by the Treaty of 1866 (14 Stat. 799) the 13th Article of which declares:

"The judicial tribunals of the Nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country, in which members of the Nation by nativity or adoption shall be the only parties; or where the cause of action shall arise in the Cherokee Nation."

The Constitution of the Cherokees of 1827 is a model of simplicity and of the application of a written Constitution, republican in form, to tribal conditions.

Mehlin v. Ice, 56 Federal 12.

What is above stated with reference to the Cherokees applies with equal force to the Choctaws, Chickasaws and the Creeks, and in a somewhat more limited degree to the Seminoles.

In 1887, when the General Allotment Act became a law (24 Stat. 398-119), the advance made in civilization by the Five Civilized Tribes and the character of their tribal title caused their exemption therefrom.

On March 3, 1893, Congress created a Commission to negotiate with the Five Civilized Tribes for the allotment of their lands in severalty, for the purpose of the ultimate creation of a State or States of the Union, which shall "em-

brace the lands within the said Indian Territory." (27 Stat. 645.) Section 15 of this Act provided that

"Upon such allotment, the individual to whom the same may be allotted shall be deemed to be in all respects citizens of the United States, * * * and, upon the allotment of the lands held by the said Tribes respectively, the reversionary interest of the United States shall be relinquished and shall cease."

Allotment Agreements were made by the various Tribes and approval thereof given by Congress as follows:

Seminole Original Allotment Agreement (30 Stat. 567), Seminole Supplemental Allotment Agreement (31 Stat. 250); Choctaw and Chickasaw Allotment Agreement (30 Stat. 495-505); Supplemental Allotment Agreement (32 Stat. 641); Creek Allotment Agreement (31 Stat. 861); Creek Supplemental Agreement (32 Stat. 500), and Cherokee Allotment Agreement (32 Stat. 716).

The policy of isolation from surrounding country applied to Indians on Indian Reservations was never, in fact, applied to the territory of the Five Civilized Tribes. In 1890 there were 180,182 persons residing in Indian Territory, of whom 51,279 were Indians. In 1900, the population of Indian Territory had increased to 392,000, of which 52,500 were Indians. In 1890 the Indian population, which included a few more Indians than those of the Five Civilized Tribes, constituted 25.5 per cent of the total population and in 1900, 13.4 per cent.

These conditions, and the progress made in securing of Allotment Agreements with the various tribes, caused Congress in 1901 to deem it advisable to confer the full rights of citizenship upon every Indian in the Indian Territory. In 1900 a bill was introduced in the House of Representatives, being House Bill No. 10701, which is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That Section 6 of Chapter 119, U. S. Statutes at Large, page 390, is hereby amended as follows,

to-wit: After the words 'civilized life,' in line 13, in said Section 6, insert the words, 'and every Indian in the Indian Territory.'"

This Act duly passed both branches of Congress and was approved by the President and became a law on the 3d day of March, 1901. (31 Stat. 1447.)

That Congress understood that the purpose of this amendment was to confer full and complete citizenship upon every Indian in the Indian Territory, appears from the language of the Act, and from a debate thereon in the House of Representatives, June 5th, 1900, appearing in Volume 33, Congressional Record 8, page 6760, and from a debate in the House on March 5th, 1906, when the House had under consideration what finally became the Act of May 8th, 1906 (34 Stat. 182-3), and which appears in Congressional Record Vol. 40, No. 4, page 2598, and from a report of the Senate Committee, to whom said bill was referred when it was under consideration, that report being as follows:

"The Committee on Indian Affairs, to whom was referred the bill (H.R. 10701) to amend Section 6, Chapter 119, United States Statutes at Large, No. 24, beg leave to submit the following report and recommend that said bill do pass without amendment.

The statute proposed to be amended provided for granting citizenship to all Indians upon receipt by them of their allotments, but made an exception of the Five Civilized Tribes, who at the time protested, on the ground that they were conducting governments of their own, which would be weakened by such a step. These governments are now completely changed and this reason has disappeared.

Under the operation of the statute referred to the Indians in Oklahoma, such as the Pawnees, the Sac and Foxes, Pottawatomies, Kickapoos, the Cheyennes and Arapahoes, and in the Indian Territory the Quapaws, the Senecas, the Wyandottes, the Ottawas and the Shawnees, and even the Modocs, have all been granted the valuable right of United States citizenship. None of these

Indians are so highly advanced as the Five Civilized Tribes, and none so well prepared to enjoy United States citizenship.

The independent self-government of the Five Civilized Tribes has practically ceased. The policy of the Government to abolish classes in Indian Territory and make a homogeneous population is being rapidly carried out. To enable the Indians of Indian Territory to properly protect their rights they should be given the right of United States citizenship immediately. They should at once be put upon a level and equal footing with the great population with whom they are now intermingled.

There are about 70,000 Indians in Indian Territory, many of whom are already United States citizens. It is doubtful whether, under the statutes, these Indians can perform any of the usual personal business engagements which are taking place daily on a vast scale in Indian Territory without a technical violation of the laws requiring supervision of the Indian people. It is true that these laws are regarded by the people of Indian Territory as not applicable to them. But all questions with regard to this matter should be eliminated by giving to them legal rights equal with other men.

By the terms of the Act 'For the protection of the people of the Indian Territory, and for other purposes,' the members of the Five Civilized Tribes are authorized to bring suits in the United States courts to recover possession of property, they are permitted to vote, and under existing laws they act on juries.

This bill simply extends to the members of the Five Civilized Tribes the same privileges that are enjoyed by other Indians to whom allotments have been made."

This Court may, in arriving at the purpose of Congress in the enactments above referred to, interpret the same in the light of the history of such Acts and existing conditions, and may consider the report of the Senate committee.

Oceanic Navigation Co. v. Stranahan, 214 U. S. 320-333.

The Delaware, 161 U. S. 459.

Buttfield v. Stranahan, 192 U. S. 470.

Sutherland on Statutory Const., 2d Ed., Sec. 470.

In the case of the *Oceanic Navigation Company v. Stranahan*, this Court, speaking through Mr. Justice White, with reference to the consideration of the report of the Senate committee on immigration, uses the following language:

"While we have said that the conclusions just stated are clearly sustained by the text, yet, if ambiguity be conceded, it is dispelled, and the same result is reached, by a consideration of the report of the Senate committee on immigration, where the provisions originated and which we have a right to consider as a guide to its true interpretation."

The purpose of the Act as stated by the Senate committee was to place the Indians of Indian Territory "upon a level and equal footing with the great population with whom they are now intermingling."

Section 6 of the General Allotment Act as amended, the amendment being in italics, is as follows:

"That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, *and every Indian in Indian Territory* is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians

within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

It will be observed that Section 6, as amended, makes every Indian in the Indian Territory a citizen of the United States and confers upon him all the "*rights, privileges and immunities of such citizens.*" (Italics ours.)

The word "all" is used for some purpose. There is no broader term in the English language. The result of so conferring citizenship was declared in *In re Heff* (197 U. S. 488) to be to dissolve the relation of guardian and ward and to endow such Indians with the full rights of citizenship.

We quote from the opinion in that case, speaking with reference to the particular statute here under consideration, as follows:

"We make these references to recent treaties, not with a view of determining the rights created thereby, but simply as illustrative of the proposition that the policy of the Government has changed, and that an effort is being made to relieve some of the Indians from their tutelage and endow them with the full rights of citizenship, thus terminating between them and the United States the relation of guardian and ward. * * *"

The Oklahoma Enabling Act (34 Statutes 267) provides that the

"*inhabitants* of all that part of the area of the United States now constituting the Territory of Oklahoma and of Indian Territory, as at present described, may adopt a Constitution and become the State of Oklahoma, as hereinafter provided. * * *" (Italics ours.)

Section 2 of the Enabling Act provides:

"That all male persons over the age of 21 years who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory or

Oklahoma, and who have resided within the limits of said proposed state for at least six months next preceding election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed state."

These sections made the inhabitants of Oklahoma and Indian Territory, including not only those persons who were then citizens of the United States, but also all members of any Indian tribe residing in either territory, members of the political community and citizens of the new state to be formed from the two territories.

In *Miner v. Happersett*, 21 Wallace 162-167, this Court, speaking with reference to citizenship in a state, uses the following language:

"Whoever then was one of the people of these states when the Constitution of the United States was adopted became *ipso facto* a citizen and a member of the state created by its adoption. He was one of the persons associated together to form the nation and was, consequently, one of its original citizens. As to this, there never has been a doubt. Disputes have arisen as to whether or not certain persons, or certain classes of persons, were a part of the people at the time, but never as to their citizenship, if they were."

The provisions of the Oklahoma Constitution made every Indian in the Indian Territory, regardless of his Federal citizenship, "one of the people of the State of Oklahoma," and therefore he "was adopted" and "became *ipso facto* a citizen and member of" the state created thereby. And such is the rule approved and declared by this Court in the case of *Boyd v. Thayer*, 143 U. S. 175, and in *Bolln v. Nebraska*, 176 U. S. 88. At the time of the institution of this suit, therefore, every Indian in the Indian Territory, including every member of the Five Civilized Tribes, was, by authority of the Act of March 3d, 1901, and by authority of the provisions of the Enabling

Act and the Constitution of the State of Oklahoma, a citizen of the United States and of said state, with all of the rights, privileges and immunities of such, and became subject to the laws of the State of Oklahoma. Congress, therefore, having conferred upon the members of the Five Civilized Tribes citizenship in the United States, with all of the rights, privileges and immunities thereof, and having constituted such members of said tribes (with the consent of the people of the state as conditioned in the Constitution thereof) citizens of the State of Oklahoma, and having subjected them to the laws of said state, civil and criminal, they were in the specific condition referred to by this Court in *In the Matter of Heff* (197 U. S. 499-508) and described in the following language:

"We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the state, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and incumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

And that such was the result of this legislation was adjudged by the trial court in this cause (*U. S. v. Allen*, 171 Federal 907-917), and was not denied by the Circuit Court of Appeals in reversing the judgment of the trial court (*United States v. Allen*, 171 Federal 913-919).

The effect of the General Allotment Act of 1887 as applied to conditions similar to those in Oklahoma with reference to citizenship was considered by Judge Hanford in the cases of *United States v. Saunders*, 96 Federal 268; *United States v.*

Kopp, 110 Federal 161, and *Ex parte Viles*, 139 Federal 68; by Judge Whitson, in the case of *United States v. Dooley*, 151 Federal 697; by Judge A. L. Sanborn, in the case of *United States v. Auger et al*, 153 Federal 671; by Judge Pollock, in case of *Ex parte Savage*, 158 Federal 205; by Judge Quarles, in the case of *United States v. Hall*, 171 Federal 214, and by Judge Marshall, in the case of *United States v. Boss*, 160 Federal 132, all of whom arrived at the same conclusion as that arrived at by Judge Campbell in his opinion sustaining the demurrers to the bill.

Judge Campbell's conclusion was that every Indian in the Indian Territory is a citizen of the United States and of the State of Oklahoma, with all of the rights, privileges and immunities of citizenship, state and national; that the conferring of citizenship destroyed the relation of guardian and ward and placed the former members of the Five Civilized Tribes upon an equal footing with the other citizens of the United States, with whom they daily intermingled and came in contact.

It seems to us that the logic of Judge Campbell's opinion is unanswerable, and that there is no reasonable escape from the conclusions arrived at by him. These conclusions have the direct and unqualified support of Judge Adams, in his dissenting opinion in this cause. This dissenting opinion is, we insist, much more logical and much more in keeping with the established standard of statutory construction than is the majority opinion.

No such public policy exists as that upon which the jurisdiction of the trial court was sustained by majority of the Circuit Court of Appeals.

Prior to 1893 the members of the Five Civilized Tribes in the Indian Territory were wards of the United States, and the title to the tribal lands was in the tribes, respectively. The United States, therefore, had control of the lands because of

the fact that they were tribal lands, and of the members of the tribes because they were wards of the National Government.

In 1893 a new policy in dealing with these tribes found its inception in the Act of March 3d, 1893 (27 Stat. 645), authorizing the allotment in severalty of the tribal lands and provided that upon such allotment in severalty of the tribal lands the members of the said tribes "be deemed to be in all respects citizens of the United States," and thereupon the "reversionary interest of the United States shall be relinquished and shall cease."

The declared purpose of this Act was to make an equitable distribution of the tribal property, confer citizenship upon the members thereof, relinquish the reversionary interest of the United States and prepare the territory for statehood. In other words, to individualize the tribal holdings, giving fee simple title to the allottees, endowing them with full citizenship and forever severing the relation of guardian and ward.

This policy was persistently carried out through all the years from March, 1893, to June 21st, 1906.

The United States originally had control of the individual Indian because of its guardianship. It had control of the lands, because they were tribal domain. It is incomprehensible that if it was the purpose of the Government to retain its control over either the *individual members* of the tribes or the allotted lands of such members that it should have, in 1901, deliberately severed the tie of personal control by making every Indian in the Indian Territory a citizen of the United States with all the rights, privileges and immunities of such. That if it was still the purpose to reserve the right to control the lands of the members of the Five Civilized Tribes, it was inexcusable on the part of the Government that it permitted the lands to be allotted in severalty to the individual members of the tribes, passing fee simple title to such members and relinquishing its reversionary interest, thereby severing its control over such property. If it had been the policy of the Government to exer-

cise the control that is now asserted, it certainly would not have severed personal control by the emancipation of its wards, and property control by the allotment in severalty of the reversionary interest of the United States.

The actions here referred to are absolutely inconsistent with the assertion of the policy contended for. The policy evidenced by this course of dealing was to emancipate the individual Indian from national guardianship and to convert the tribal domain, which might be managed or controlled by the National Government, into an individual fee simple holding which might not be controlled by the National Government.

We therefore respectfully submit that upon the question of whether or not such policy did, in fact, exist, the evidence is overwhelmingly against the Government's contention.

Public Policy as a Head of Federal Equity Jurisdiction.

Circuit Judge Adams, in his dissenting opinion in this case, makes the following statement:

"With no title, legal or equitable, to protect and no duty of a trust character to perform, a new head of equity jurisdiction had to be discovered to justify the maintenance of these suits by the Government; and this, it is claimed, is found in the obligations of the Government to enforce a great national policy."

Judge Amidon, speaking for the majority of the court, uses the following language:

"Turning now to the objections which were made and sustained by the trial court, has the Federal Government such an interest as entitles it to maintain these suits? It will be conceded at the outset that it has no legal or equitable estate in the allotments; and if such an estate is necessary it has no standing in court. It is, however, too plain for controversy that the Federal Government imposed restrictions upon alienation of these allotments. That restriction was its main reliance for

the social and industrial elevation of the Indians. Has it a standing in court for the enforcement of its policy? To say that it has not is to make the restraints upon alienation a mere *brutes fulmen*."

Circuit Judge Adams, sitting as a member of the Court of Appeals, and District Judge Campbell, sitting as a trial judge, were each of the opinion that no such public policy existed as that outlined in the majority opinion, and that if it did exist it could not be enforced at the suit of the United States.

District Judge Amidon, with whom Circuit Judge Hook at least concurred in the results, determined that such a policy existed and that it afforded authority for the institution and maintenance of this suit and operated to confer jurisdiction upon the Circuit Court to entertain the same.

No better illustration can be had of the uncertainties resulting from a departure from the usual and ordinary canons of statutory construction and the adjudging and determining of rights without regard thereto upon a supposed public policy. Two judges say such a policy exists. Two of equal rank say it does not exist. The two who say the policy does not exist undertake to solve the questions presented by the ordinary canons of statutory construction. The two who say such a policy does exist apparently appeal to the *unwritten law* as a higher authority than the positive enactment of a statute.

We respectfully insist that in declining to apply the terms of the statute and in determining the rights of the parties involved in this controversy upon the supposed public policy, the Circuit Court of Appeals committed serious error.

This Court, in the case of *Hadden v. Collector* (5 Wallace 107-111), uses the following language with reference to the suggestion that it should be controlled by the public policy of the Government in interpreting certain legislation, to-wit:

"What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing upon which all sorts of notions, each vari-

ant from the other, may be formed by different persons. It is a ground much too unstable on which to rest the judgment of the court in the interpretation of statutes," (Italics ours.)

In the case of *Bate Refrigerating Company v. Sulzberger* (137 U. S. 1-26), where this Court was again invited to depart from the ordinary canons of construction and follow a supposed public policy, the following language is used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden v. Collector* (5 Wallace 107-111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.'"

In the case of *Dewey v. United States* (178 U. S. 510-521), this Court, discussing the matter of determining the effect of a statute by supposed public policy, uses the following language:

"In our examination of this case we have not forgotten the skill and heroism displayed by the distinguished commander of our fleet in the battle of Manila, as well as by the officers and sailors acting under his orders. All genuine Americans recall with delight and pride the marvelous achievements of our navy in that memorable engagement. But this Court cannot permit considerations of that character to control its determination of a judicial question or induce it to depart from the established rules for the interpretation of the statutes. Nor can we allow our judgment to be influenced by the circumstances that Congress has recently repealed all statutes giving bounty to officers and soldiers of the navy for the sinking or destruction hereafter, in time of war, of an enemy's vessels, thereby, it may be assumed, indicating that in the judgment of

the legislative branch of the Government the policy of giving bounties to the navy *was not founded in wisdom and should be abandoned. This Court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress.* What is termed the policy of the Government in reference to any particular subject of legislation, this Court has said, 'is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' (*Hadden v. The Collector*, 5 Wall. 107, 111.) Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be the law which Congress has not enacted as such." (Italics ours.)

We desire to again call the Court's attention to a previous quotation from the opinion of this Court in the case of *State of Oklahoma v. Atchison, Topeka & Santa Fe Railway Company*, *supra*. It is as follows:

"We are of the opinion that the words in the Constitution conferring original jurisdiction on this Court in a suit 'in which a state shall be a party' are not to be interpreted as conferring such jurisdiction in every case in which the state elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or *public policy* against wrongdoers generally." (Italics ours.)

If the enforcement of a public policy or of a law of a state is not sufficient to justify a state to maintain an original proceeding in this Court, how can it be said that the enforcement of a public policy is sufficient to confer jurisdiction upon the Circuit Court of the United States?

The attention of the Court is also invited to the following cases:

In re Wolfe & Levy, 122 Federal 127-133.
Southern Ry. Co. v. Machinists' Local Union, 111 Federal 49-57.
Shellenberger v. Ransom, (Neb.) 59 N. W. 935.
United States v. Chongsum, 47 Federal 224.
Opinion of the Justices, 36 N. H. 665, 23 Atlantic 1095.

The Circuit Court of Appeals apparently held that the interest of the United States in seeing its laws enforced was sufficient to justify the initiation of a proceeding upon its behalf purporting to be in favor of one citizen in a state against another in the same state, to remedy the supposed infraction of such laws.

The authority for this proceeding, as determined by said court, is the public policy of the United States to see that its laws are enforced. It is undoubtedly the policy of every Government that the laws enacted by its legislative body should be observed and enforced. We are not aware of any case in which it has been held that the United States may intermeddle in controversies between citizens of a state or create controversies between citizens of a state over their objections, because, in the judgment of some administrative officer, the laws of the United States, which are neither criminal nor penal in their nature, have not been observed in the making of the transaction assailed.

Provision is made by the laws of the United States for the acquiring of homesteads by certain persons upon public lands of the United States and for the protection of such homesteaders against incompetency, bad judgment and misfortune. It is provided (Revised Statutes, Sec. 2296) that "no lands acquired under the provisions of the chapter shall, in any event, become liable for the satisfaction of any debt contracted prior to the issuing of the patent therefor." It is, therefore, undoubtedly the declared policy of the United States to protect the homesteader on the public lands against enforced alienation

of his homestead upon any debt contracted prior to the issuing of the patent.

Suppose such homestead be levied upon under an execution issued upon a judgment for a prior debt. Could the United States bring a suit to enjoin the sale of the property under execution or take any other proceeding to prevent such sale? If public policy is sufficient authority for the institution of a suit in the Circuit Court of the United States to cancel a conveyance made by one citizen of the State of Oklahoma to another, why would it not be sufficient authority to institute a suit to prevent the enforced sale upon a prior debt of a homestead selected out of the public lands?

Almost every state in the Union has a homestead law which exempts from enforced sale a certain amount of land reserved as a homestead for the protection of the family. It is the declared policy of the states to protect the family against the incompetency and financial embarrassments of the husband. Such policy of protection is, perhaps, the most deeply rooted of any declared policy in any state. Could the state maintain an action in its own name to prevent the enforced sale of such homestead in violation of a constitutional or statutory provision? The alienation of lands by minors is generally prohibited. May the state bring suits in its own name to enforce its policy of protection to minors for the purpose of setting aside a conveyance made by a minor? Such proceeding is unheard of in legal lore. Yet, would there not be more reason for sustaining such an action than for sustaining the action at bar?

Married women in many states are prohibited from conveying their real estate except upon certain conditions and under certain limitations. Could the state maintain an action in its own name to set aside a conveyance made by a married woman for the purpose of enforcing its policy of protection?

Special legislation has been enacted in most states for the protection of idiots and insane persons and their estates. It is, no doubt, the avowed policy of every state to prevent idiots

and insane persons from conveying their property. May a state, to enforce its policy, bring a suit to set aside conveyances so made? We know of no such proceeding, nor do we believe that the courts of any state in the Union would entertain such an one.

There are hundreds of laws enacted by the state in the exercise of its police powers, and, no doubt, always it is the express policy of the state that such laws shall be observed. Many of them affect or control the ordinary every-day transactions of life. No one will insist that the state could, as between its citizens, institute a suit in its own name to revoke any contract or conveyance, in the making of which the parties failed to observe the provisions of any law of the state.

The Act of May 27th, 1908.

We can perhaps do no better than preface our discussion of this subject with a quotation from the opinion of Judge Campbell in disposing of this phase of the matter in the trial court and of Judge Adams in his dissenting opinion in the Circuit Court of Appeals.

We quote as follows from the opinion of Judge Campbell in case of *United States v. Allen et al*, 171 Federal 907, 13:

"In the Act of Congress approved May 27, 1908 (35 Stat. 314, c. 199), relative to removal of restrictions, is found the following provision:

'Nothing in this Act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the

Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this Act.'

It is contended that this provision confers upon complainant authority to institute and maintain these suits in the name of the United States. The dominant purpose of this provision seems to be to preclude any such construction of the Act as would deny the United States the right to bring such suits referred to, rather than to confer such right. The bill, as originally introduced, did not contain this provision. On February 10, 1908, at the same session, a bill was introduced by Mr. Sherman, in the House, and Senator Clapp, in the Senate, specifically conferring upon the Attorney General the right to bring such suits in the name of the United States, 'for the use and benefit and on behalf of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes, or any enrolled member of either thereof.' This bill covers over six pages, providing in detail for the conduct of such suits, and also providing for the transfer from the state to the federal courts of such suits in which the United States may become a party, as provided in the bill. This bill did not become a law. After its introduction, and while the Committee on Indian Affairs was considering the Act of May 27, 1908 (35 Stat. 312, c. 199), the Assistant Attorney General for the Interior Department appeared before the committee (Report of Committee on Indian Affairs of March 20, 1908), stating that the department was in favor of the bill under consideration, but calling attention to the jurisdictional bill above referred to, saying that:

'The Department believes that some provision for jurisdiction should be passed with the other bill, for these reasons, briefly, that, if it is not necessary, it could do no damage.'

He then referred to a number of cases arising in the state courts, wherein he deemed it advisable that provision be made for removal to the Federal Court. He said:

'The Department feels that if the restrictions bill should be passed separately that there would be no possible chance, perhaps, to enact this other bill, because the term is approaching its end, and it is very difficult to get any legislation where there is any direct, active opposition to

it. That being the history of such efforts, it is the feeling of the Department that the two should be passed together.'

Then followed a lengthy discussion between the representatives of the Department and members of the committee relative to incorporating such jurisdictional provisions. It was conceded that without such provision the existence of the authority and jurisdiction was not without question, the Assistant Attorney General insisting, however, that it already existed. Three of the Oklahoma representatives on the committee opposed the incorporation of a measure granting additional jurisdiction, insisting that only such powers and jurisdiction as already existed by virtue of the Enabling Act and other legislation should be exercised by the Federal Government, and conceded that, if they existed, their exercise was proper. Finally the paragraph now being considered was incorporated.

The jurisdiction bill which failed was one positively and specifically conferring the authority and jurisdiction as if they had not theretofore existed. This provision is negative in its terms, not purporting to confer the right, but disavowing any intention to deny the same. Therefore it can hardly be said that these eleven lines were incorporated in this bill in lieu of the jurisdiction bill containing over six pages. In view of this legislative history, it is my opinion that it was only intended by this paragraph to provide that, if by existing legislation the United States had authority to institute and maintain such suits, it was not the desire nor the intention of Congress for this Act to deny it, and it should not be so construed.

It is urged that the appropriation of money for such suits is a legislative recognition of their validity. In my judgment, it cannot be so construed in this case. It is the expressed purpose of Congress not to deny the right if it existed. A refusal to provide money for the conduct of such suits would have prevented their institution and maintenance, resulting the same as a denial of the right. Hence the appropriation. The authority of the complainant to maintain these suits, if it exists, must be found elsewhere."

We also quote from the dissenting opinion of Judge Adams in the case of *United States v. Allen et al*, 179 Federal 13, 24, as follows:

"The foregoing considerations, in my opinion, indicate that Congress has adopted a new policy concerning these Indians, namely, the promotion of self-reliance, self-respect, economy and thrift, and to this end, after making the special provision above indicated and perhaps others of like character, has left them otherwise subject to general laws governing all citizens. Equality of opportunity is all an American citizen ought to demand; and this and more in the respects just indicated Congress has given the members of the Five Civilized Tribes. With these special provisions made in their behalf the legislative intent and purpose seems to have been to leave them to justify their right to citizenship by coping with other citizens in the affairs of life on an equal footing without the expectation or hope of other special governmental intervention. Such intervention in the way of institution of suits at wholesale as done in these cases, without the request or consent of the Indians, is not only humiliating in itself, but tends to defeat the true national policy by discouraging self-reliance and independence of action. The policy of encouraging and aiding the Indians to act for themselves independently, rather than of aggressively interfering, without their consent, to assert their statutory rights is distinctly recognized, if not commanded, in Section 6 of the Act of May 27, 1908, above cited. Section 1 of that Act as already pointed out imposes certain restrictions upon the alienation of lands by the Indians. Section 6, after authorizing the Secretary of the Interior or his representatives to take special interest in behalf of minors under guardianship, enacts that:

'Said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands, of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land, he shall, without charge, except the necessary court and recording fees and expenses, if any, in

the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other incumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.'

Notwithstanding other provisions of the Act referred to in the opinion of the majority, I think the part just quoted manifests a clear legislative intent and purpose that the United States, by and through the Secretary of the Interior, should act with respect to the violation of restrictions primarily in an advisory way, and instead of ever bringing suit in its own name at pleasure, should bring them only when requested by allottees, and then only in their names. If these suits can be maintained, it is not apparent where the Government can stop in its litigation in behalf of private persons in the enforcement of national policies. There are certainly many recognized policies besides the Indian policy which might be materially subverted by the practice of governmental intervention as in this case. Where would it end? In my opinion, the judgment below should be affirmed."

It is patent to the most casual observer that if protection to the Indian allottees is what the Department is really seeking, that ample provision is made therefor in Section 6 of said Act, independently of any right to maintain a suit by the United States to cancel the conveyances involved. Such provision having been made and Congress having declined to give the right asserted, is it not a more reasonable assumption that Congress intended for the Department to exercise the right granted and not to exercise the right which it refused to grant?

It seems to us that the learned judge who rendered the opinion for the majority of the court in the Circuit Court of Appeals has made an unjustifiable application of one of the paragraphs of said Act, to-wit, the concluding paragraph of

Section 6. The other, and we think controlling, provisions of said Act are ignored and are given no effect whatever. He proceeds, if we interpret his language correctly, to hold that the language, "Nothing in this Act shall be construed as a *denial* of the United States to take such steps as may be necessary," etc., operates to confer not only authority upon the United States to maintain an action in its own name, but jurisdiction upon the Circuit Court of the United States to entertain the same. The result of the language used is in effect to say that a declaration that the provisions of the Act shall not operate as a *denial* of a certain right is the equivalent of a positive *grant* of the *right*. Not only this, but the effect of the decision is to go further, and confer jurisdiction upon the Circuit Court to entertain a suit which the learned judge decides has been by a *negative* provision *affirmatively* granted.

We most respectfully insist that this interpretation of the statute is neither natural, plausible, nor justified by the context or the history of the Act.

During the consideration of the Act of May 27, 1908, the Secretary of the Interior sent to Senator Clapp, chairman of the Senate Committee on Indian Affairs, a proposed Section 2 of said Act, which read as follows:

"That any suit or suits provided for in this Act may be instituted in any court of the State of Oklahoma where jurisdiction over the subject matter and person may be had according to the laws of said state, or in the Circuit Court of the United States for the Eastern District of Oklahoma, and the said Circuit Court of the United States is hereby given jurisdiction, concurrent with the courts of said state, in any and all of the suits and proceedings authorized by this Act, without regard to the amount in controversy."

This proposed draft was accompanied by a letter giving the reasons why it was insisted the provisions ought to become a law. The departments seeking legislation insisted upon the

enlargement of the jurisdiction of the Circuit Court by a distinct and definite provision. Such enlargement of jurisdiction was resisted, the final result being nothing more than a declaration that the Act itself could not operate as a denial of jurisdiction.

We respectfully submit that the interpretation of the Act by Judges Adams and Campbell is the correct one. We doubt seriously, notwithstanding the language of this Court in the case of *Tiger v. Investment Company*, if it lies within the power of Congress under the Constitution to confer jurisdiction upon a Circuit Court of the United States to entertain a suit by the United States in its name and on behalf of, but over the objection of, a citizen of Oklahoma touching his property or contract rights, and this notwithstanding the reservations in the Enabling Act. The power of Congress in this particular rests on the eighth section of Article 2 of the Federal Constitution. This provision is as follows:

"The Congress shall have power * * * to regulate commerce with the foreign nations and among the several states and with the Indian tribes. * * *

We most earnestly protest that the authorization, even if attempted, to bring a suit in the name of the United States for and on behalf of a citizen of the State of Oklahoma, over his protest and objection, or without his consent, is not a regulation of commerce with an Indian tribe. And we further respectfully submit, in view of the decision in the case of *Coyle v. Smith*, 31 Sup. Ct. Rep. 688, *Advance Sheets; Pollards, Lessee, v. Hagan*, 3 How. 212-235; *Escamba v. Chicago*, 107 U. S. 678; *Bolln v. Neb.*, 176 U. S. 83, and *Dick v. U. S.*, 208 U. S. 340, that an agreement between the United States and the State of Oklahoma, that such might be done, would be violative of the Federal Constituion and void. To say that Congress would have such right because the citizens affected

thereby happen to be of Indian ancestry, either direct or remote, would be to hold to the right of Congress to legislate in regulation of the ordinary affairs of the citizens of the State of Oklahoma who happen to be of Indian descent for all time to come. We do not believe such authority exists under the Constitution or that it was the purpose of Congress by the passage of the Act of May 27, 1908, to provide for the exercise of such authority. It might as well be contended that the allowance by Congress of an appeal from the Circuit Court of Appeals of the Eighth Circuit from orders reversing judgments of the trial court which immediately followed the action of the Circuit Court of Appeals reversing the judgment of the trial court in this case was a declaration by Congress that it did not intend to confer such jurisdiction, as to hold that the provisions of the Act of May 27, 1908, or elsewhere, making an appropriation for the maintenance of suits, conferred such jurisdiction upon Circuit Courts.

There Is a Defect of Parties.

The allottees are indispensable parties:

(1) They own the lands involved and have such an interest in the subject matter of the controversies that final decrees cannot be made without affecting their interest.

(2) The causes of action, if any, are theirs; they have the right to conduct suits either in the state or federal courts to test the validity of the conveyances sought to be canceled. Perhaps many of them now have actions in the state courts to cancel the conveyances attacked here. Decrees in the cases at bar can have no effect as between the purchasers and the allottees. Estoppel by judgment must be mutual. These cases cannot make an end of the litigation.

(3) If the United States had the right to maintain these suits the same right would be co-existent in the allottees, and for this reason they must be made parties.

(4) Every party to a contract except one who has released his interest or an agent through whom the title has passed is an indispensable party to set it aside.

(5) If the allottees are not made parties and it should be held that any of the conveyances are void the final determination may be wholly inconsistent with equity and good conscience on account of the allottees retaining the consideration paid by the purchasers and still in the hands of the allottees, and on account of the taking without recompense of the improvements made by the purchasers in good faith, which improvements have imparted value to the lands.

(6) If Indians or freedmen have made void conveyances covering their lands the situation is analogous to that of void conveyances of family homesteads made inalienable by state laws, or void conveyances by the insane or other incompetents—the sovereignty has no right or duty to cancel such conveyances, this right reposing both by natural justice and constitutional law in the owners of the lands or their legal representatives.

(7) Section 6 of the Act of May 27, 1908, clearly provides that the Secretary of the Interior shall act only in an advisory way for the allottees whose lands are restricted, and that his representatives shall, when necessary, bring suit in the names of the allottees without charge for legal service, instead of the Secretary bringing suits in the name of the United States at wholesale without the request or consent of the allottees.

In the case of *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 826, Mr. Justice Miller, delivering the opinion of the court, said:

"The learning on the subject of parties to suits in chancery is copious, and within a limited extent the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that, while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such that if their interest and their absence are formally brought to the attention of the court it will require them to be made parties if within its jurisdiction, before deciding the case. But if this cannot be done it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties that their legal presence as parties to the proceedings is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to the jurisdiction.

This class cannot be better described than in the language of this Court in *Shields v. Barrow*, 17 How. 130 (15 L. Ed. 158), in which a very able and satisfactory discussion of the whole subject is had. They are there said to be 'persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.'"

In *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed., p. 187. the Court used this language:

"* * * The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First. Where a person will be directly affected by a

decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Second. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Third. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

In *Ribon v. Railroad Companies*, 16 Wall. 446, 21 L. Ed. 368, the rule for indispensable parties is thus presented:

"The rule in equity as to parties defendant is that all whose interests will be affected by the decree sought to be obtained must be before the court; and if any such persons cannot be reached by process (do not voluntarily appear, or from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties) the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and those absent are inseparable, the obstacle is insuperable. The Act of Congress of 1839 and the rule of this Court upon the subject give no warrant for the idea that parties whose presence was before indispensable could thereafter be dispensed with. The subject was fully considered in *Shields v. Barrow*, 17 How. 130 (58 U. S., XV., 158). What is there said need not be repeated."

In *Mallow v. Hinde*, 12 Wheat. 198, 6 L. Ed. 599, the reason underlying the rule for indispensable parties is stated thus:

"In this case the complainants have no rights separable from and independent of the rights of persons not made parties. The rights of those not before the court lie at

the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.

We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

In *Chadbourn v. Coo*, 51 Fed. 479, the Circuit Court of Appeals for the Eighth Circuit summarized the rules of equity practice as to parties as follows:

"* * * 'Necessary parties' are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Such persons must be made parties, if practicable, in obedience to the general rule which requires all persons to be made parties who are interested in the controversy, in order that there may be an end of litigation; but the rule in the federal courts is that if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may proceed to a final decree between the parties before the court, leaving the rights of the absent parties untouched, and to be determined in any competent forum. The reason for this liberal rule in dispensing with necessary parties in the federal courts will be presently stated. 'Indispensable parties' are those who not only have an interest in the subject matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Shields v. Barrow*, 17 How. 139; *Ribon v. Railroad Cos.*, 16 Wall. 450; *Coiron v. Milaudon*, 19 How. 113; *Williams v. Bankhead*, 19 Wall. 563;

Kendig v. Dean, 97 U. S. 423; *Alexander v. Horner*, 1 McCrary 634.

The general rule as to parties in chancery is that persons falling within the definition of 'necessary parties' must be brought in, for the purpose of putting an end to the whole controversy, or the bill will be dismissed, and this is still the rule in most of the state courts. But in the federal courts this rule has been relaxed. The relaxation resulted from two causes: First, the limitation imposed upon the jurisdiction of these courts by the citizenship of the parties, and, secondly, their inability to bring in parties, out of their jurisdiction, by publication. The extent of the relaxation of the general rule in the Federal Court is expressed in the forty-seventh equity rule. That rule is simply declaratory of the previous decisions of the Supreme Court on the subject of the rule. The Supreme Court has said repeatedly that, notwithstanding this rule, a Circuit Court can make no decree affecting the rights of an absent person, and that all persons whose interests would be directly affected by the decree are indispensable parties. *Shields v. Barrow*, *supra*; *Ribon v. Railroad Cos.*, *supra*; *Coiron v. Millaudon*, *supra*; *Alexander v. Horner*, *supra*; *Cole S. M. Co. v. Virginia & G. H. W. Co.*, 1 Sawy. 685."

The allottees are parties in interest. They own the lands involved. All except the Seminoles have their patents. The Seminoles have a perfect equity in their lands; they have long since received their allotments, and certificates have issued therefor; they have taken possession of their lands and performed every duty upon their part to be performed. Patents should have been delivered to them long ago and are now withheld by those who ought to deliver them, though executed and ready for delivery. The allottees are therefore principally and fundamentally interested. They are the only parties to be benefited by the decrees if the Government wins. They are the parties against whom the purchasers of lands involved desire a judgment that will be binding. Their rights are to be determined. If void conveyances have been made by the allottees,

and on account thereof their titles are clouded and the use and possession of their lands lost for the time being, then their wrongs are to be redressed, their rights restored. It is clear that the Government cannot conduct litigation for and bind the citizens of the United States and citizens of Oklahoma who are owners of the fee simple title of their lands without their presence in court. It is equally clear that heretofore the Government has never maintained suits in the interest of Indians except in cases where it had some title, legal or equitable, to protect or a duty of a trust character to perform, and in all such cases the Indians were bound by the result. To meet this difficulty the majority of the court below provided by judicial discovery a ground for the Government's actions never invoked heretofore, as was stated in the dissenting opinion by Judge Adams:

"With no title, legal or equitable, to protect, and no duty of a trust character to perform, a new head of equity jurisdiction had to be discovered to justify the maintenance of these suits by the Government, and this it is claimed is found in the obligation of the Government to enforce a great national policy."

The United States cannot have rights in these cases separable from and independent of the rights of the allottees who are not made parties. The rights of the allottees who are not before the court lie at the very foundation of the claim of right by the United States, and therefore the attempted distinction between the rights of the allottees and the rights sought to be enforced by the Government in these cases is not real. As was stated in *Mallow v. Hinde*, *supra*:

"The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and final decision cannot be made. * * * We put it on the ground that no court can adjudicate directly upon a person's rights without the party being either actually or constructively before the court."

The right of the owners of the land involved to conduct suits in their own names either in the state or federal courts to determine the validity of these conveyances is conceded. It is a matter of common knowledge that allottees are now conducting such suits for themselves in the state courts of Oklahoma. There they seek the cancellation of some of the deeds here involved. Their suits will result in judgments binding upon both vendors and purchasers. Decrees in the cases at bar will affect only the purchasers, if they can have any effect at all. The pendency of the suits here is not even a bar to the prosecution of those there. Decrees against the United States in these cases could not be set up as defense there. Here the merits of the cases as to the allottees individually are not involved; there the merits of the controversies in the cases at bar are involved as to the allottees. If these cases by the United States progress to final decrees doubtless many of the allottees will claim, as is true, that the so-called classification of the Indian lands as to alienability is more fanciful than real; that there are many questions of alienability involved which will not be properly presented to the court for adjudication in these cases. Therefore the litigation will continue and become more and more burdensome and oppressive to *bona fide* purchasers of lands in the territory heretofore that of the Five Civilized Tribes.

If the United States had the right co-existent with the allottees to sue it would nevertheless be necessary to bring them before the court. Bates on Federal Equity Procedure, at Section 40, says:

"And 'the principle that persons having co-existent rights with the plaintiff to sue the defendant must be brought before the court in all cases where the subject matter of the right is to be litigated in equity is not confined to cases where such co-existent rights to sue are at law; it applies equally to cases where another person has a right

to sue for the matter in equity; in such cases the defendant is equally entitled to insist that persons possessing such a right should be brought before the court before any decree is pronounced, in order that such right may be bound by the decree.' The rules apply whether the legal or equitable right to sue extends to the whole or only a portion of the subject of the suit."

Every party to a contract of sale except one who has released his interest or an agent through whom the title has passed is a necessary party to set it aside.

- Shields v. Barrow*, 17 How. 130.
Coiron v. Millaudon, 19 How. 113.
Gaylords v. Kelshaw, 1 Wall. 81.
Ribon v. Railroad Cos., 16 Wall. 446.
Lawrence v. Wirtz, 1 Wash. C. C. 417.
Tobin v. Walkinshaw, 1 McAll. 26.
Bell v. Donohoe, 17 Fed. R. 710.
Florence E. Mach. Co. v. Singer Mfg. Co., 4 Fisher's Pat. Cas. 329; s. c., 8 Blatchf. C. C. 113.
Chadbourne v. Coe, 45 Fed. R. 822.
Empire C. & T. Co. v. Empire C. & M. Co., 150 U. S. 159.
New Orleans W. Co. v. New Orleans, 164 U. S. 471; s. c. in C. C. A., 51 Fed. R. 479.
Clark v. Great Northern Ry. Co., 81 Fed. R. 282.
 But see *French v. Shoemaker*, 14 Wall. 314.
West v. Duncan, 42 Fed. R. 430.
Smith v. Lee, 77 Fed. R. 779.

If any of the deeds taken in good faith are held to be void final decrees in these cases against the purchasers would leave matters in a condition wholly inconsistent with equity and good conscience. The bills show that large considerations passed to the vendors. It is reasonable to presume that a large part of the consideration so paid is yet in the hands of the allottees. It is fair to suppose that in many cases other property, such as realty in cities or other farm lands, were exchanged for the

lands involved. If the vendors were parties to these suits they could not retain the purchase price in their hands or other property which they have received in exchange, for he who seeks equity must do equity. If any of the conveyances are void on account of restrictions we do not claim that the Court should decree a return of the consideration as a condition precedent to the surrender of the restricted lands, but where the consideration is yet in the hands of the allottees they should be compelled to return it, and in the same suits in which they seek cancellation of their deeds. And it also seems to us clear that in every case where the parties acted in good faith the Court ought to decree a personal judgment against the allottees for the amount of the consideration, for it was paid by mistake and the consideration for the payment has failed. If the contracts were void, but in good faith, equity will impute a promise to repay.

Wrought Iron Bridge Co. v. Utica, 17 Fed. R. 316.

City of Louisiana v. Wood, 12 Otto 294, 26 L. Ed. 153.

Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040.

Tate v. Gains, (Okla.) 105 Pac. 193.

In *Wrought Iron Bridge Company v. Town of Utica*, *supra*, the Court said:

"I do not care to spend time upon a metaphysical discussion of the question whether complainant acted under a mistake of fact or a mistake of law in making this contract. * * * Payment was refused by the county on the ground that the notes and mortgage given to secure the same were void for want of power to make them. The seller filed a bill to obtain restitution of his property. * * * The bridge has not been paid for and they have, therefore, no equitable right to keep it without paying for it."

In *Tate v. Gains, supra*, which involved the validity of a contract made between an Indian and a purchaser of his land, providing that if the purchaser lose possession of the land on account of restrictions upon it that the Indian would restore the purchase price, the court said:

"Under the contract and the law, defendant yielded possession *in praesenti*, or from day to day, and plaintiff secured it in the same way. Such a possession creates a tenancy at will. * * * The estate may arise by implication as well as by express words. So, while the conveyance was wholly void and of no effect in itself, the possession of the grantee amounted to a tenancy at will, not made so by the void conveyance, but because out of the effort to deal came a permission to enter the land, relieving grantee of the imputation of and liability for trespass. In order to secure this possession, grantee offered, and had accepted by grantor, a certain sum of money, and within the understanding of the parties grantee was to improve the land while permitted to remain in possession. * * * There is no reason we can perceive why the defendant, having secured from plaintiff under the arrangement mentioned in this case the money and property involved, should be permitted, upon repossessing herself of the consideration therefor, to retain both. A reasonable rental is certainly all that she has a right to claim."

The obligation to do justice rests upon all persons, including Indians, and therefore if the allottees have obtained money or property without authority and without consideration the law, independent of any statute, will compel restitution or compensation, and this ought to be made in the same action and at the same time that the void contracts are canceled.

This further question will arise in the event any of the deeds are invalid: Where these allottees have received the benefit of an invalid contract and such benefit is permanent and substantial and connected with the land, adding additional

value thereto, which gives land that had no rental value great value for rental purposes, will the law permit the parties causing such benefits to accrue, believing that they acted within the pale of law, to be recompensed therefor when the allottees seek to avoid such illegal contracts? Or to put the matter in a different way: Shall the lands that were useless increase in intrinsic value and become the source of constant benefit through the *bona fide* expenditures upon the part of the purchasers without creating a legal obligation whereby the owners shall be made to compensate those who made the improvements? This situation should be disposed of as when the lands of minors have been improved under the terms of void improvement leases by the guardians. Valuable and lasting improvements have been made often in good faith under void contracts upon the lands of minors under such circumstances that the courts have treated as done that which ought to have been done, and have recompensed those who gave the land value by improvements. If proper application had been made to the probate courts for such improvement leases the request would have been granted, and, in order to do justice to the occupants under the void contracts, the law has implied a valid obligation to recompense the lessees, not for the value of the improvements but for the enhanced value of the premises. Likewise, if deeds are canceled because the lands were inalienable where the parties were in good faith, the Court should imply as done that which ought to have been done, and would have been done, perhaps, if proper application had been made to the Secretary of the Interior. And though the void deeds will be treated as nullities, the law will imply just such an obligation to pay for the enhanced value to the premises on account of the improvements as the Secretary of the Interior would have permitted the allottees to contract upon proper application to him. Where the lands had no rental value, and, on account of the improvements so made in good faith, now have a great rental value,

it should be decreed that the rentals or a part thereof be set aside each year until compensation shall have been made for the same.

Muskogee Development Co. v. Green, (Okla.) 97 Pac. 619.

White v. Brown, (Ind. T.) 38 S. W. 335.

Poplin v. Clausen, 38 S. W. 974.

Shumate v. Harbin, 15 S. E. 270.

Brockway v. Thomas, 36 Ark. 518.

Beard v. Dansby, 48 Ark. 183, 2 S. W. 701; and

Potts v. Cullum, 68 Ill. 217.

A great number of the conveyances attacked belong to classes held to be good by the Supreme Court of Oklahoma, and by the United States courts in Oklahoma, and it is not necessary to argue that the purchasers of such lands have acted in good faith. Moreover, on account of the many confusing and conflicting laws governing the lands allotted to members of the Five Civilized Tribes, it is certain that some honest persons have been misled as to the character of the conveyances to them. The contention of the Government that the lands were inalienable when the conveyances were made makes it imperative that the allottees be brought in so that there may be an end of the litigation and that purchasers may be protected both in the consideration paid and for their improvements made in good faith in the event the purchasers lose.

It is not necessary for the Government to interfere merely because void conveyances have been made upon restricted lands. If this has been done, the situation is analogous to cases where deeds have been executed upon homesteads restricted by state laws, or where void conveyances have been made by infants or insane persons. In the history of our jurisprudence it has never been held necessary, we believe, for the sovereign imposing the restrictions to interfere by suit to protect those for

whose benefit the restrictions were imposed. Few are so foolish as to knowingly violate laws against alienation of lands. The courts are ready to give relief. What the situation needs is test cases to settle questions of alienability, and not wholesale and oppressive suits.

Section 6 of the Act of May 27, 1908, provides:

"Said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands, of all their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other incumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands."

This clearly means that the Secretary of the Interior, instead of being authorized to conduct suits against purchasers of Indian lands, is authorized merely to advise and assist all allottees whose lands are restricted. His representatives in the various counties in Eastern Oklahoma are directed to institute suits, without attorney fees, for such allottees and *in their names* to remove clouds from their title.

Bill Is Devoid of Equity.

The United States cannot maintain this bill because they are wholly devoid of equity.

The United States have not offered to return the consideration paid, they are out of possession, and if the facts alleged are true, they have an adequate remedy at law. That a bill in equity is not a proper remedy for the recovery of real estate held adversely, attention is called to the opinion of this Court in *Frost v. Spitley*, 121 U. S. 552, in which it is said (p. 556) :

“Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff.”

In *Orton v. Smith*, 18 How. 263, Mr. Justice Grier, speaking for the Court, says in the following language :

“Those only who have a clear, legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title.”

The language of the Court in this case of *Frost v. Spitley*, and *Orton v. Smith*, *supra*, is quoted with approval in *Dick v. Forraker*, 155 U. S. 404, 414.

In *The United States v. Wilson*, 118 U. S. 86, where the United States served numerous defendants and a demurrer was sustained and appeal taken by the United States, Mr. Justice Mathews, speaking for this Court, used the following language in disposing of the case (p. 89) :

"Having the legal title, then, but being kept out of possession by the defendants holding adversely, the remedy of the United States is at law to recover possession. Equity in such cases has no jurisdiction, unless it is required to remove obstacles which prevent a successful resort to an action of ejectment, or when, after repeated actions at law, its jurisdiction is invoked to prevent a multiplicity of suits, or there are other specific equitable grounds for relief. Bills *quia timet*, such as this is, to remove a cloud from a legal title, cannot be brought by one not in possession of the real estate in controversy, because the law gives a remedy by ejectment, which is plain, adequate and complete. This is the familiar doctrine of this Court. *Hipp v. Babin*, 19 Howard 271; *Ellis v. Davis*, 109 U. S. 485; *Killian v. Ebbinghaus*, 110 U. S. 568; *Fussell v. Gregg*, 113 U. S. 550."

This case would seem to effectively dispose of the rights of the United States to maintain these actions under the general equity practice.

It is true that if the state statute provides for the bringing of a suit to quiet title by a party out of possession, that the Federal courts can administer the said remedy. The statute in force in Oklahoma upon this subject is Section 4787 of Wilson's Statutes, and is as follows:

"An action may be brought by any person in possession, by himself or tenant, of real property against any person who claims an estate, or interest therein, adverse to him, for the purpose of determining such adverse estate or interest."

Under this statute and in keeping with this provision the Supreme Court of Oklahoma has HELD that actual possession is necessary to enable a party to maintain an action to quiet title, unless the premises are vacant or unoccupied (*Christy v. Spring*, 11 Okla. 710, 69 Pac. 864), and such was the construc-

tion of the statute of Kansas before it became the statute of Oklahoma.

If the conveyances referred to are void they constitute no cloud upon the title of the owner thereof, and a bill will not lie to cancel the same, even though the other grounds of equitable jurisdiction are present. *United States v. Saunders*, 96 Federal 268; *Piersol v. Elliott*, 6 Peters 96, 101; *Rich v. Braxton*, 158 U. S. 375, 407; *Kennedy v. Hazleton*, 128 U. S. 667, 672; *Town of Venice v. Woodruff*, 62 N. Y. 462, 467; *Marsh, Executrix, et al v. The City of Brooklyn*, 59 N. Y. 280.

Bill of Complaint Is Multifarious.

Because of the joinder in the bill of distinct and independent matters, each of which would constitute, if the allegations were sufficient, a separate cause of action; and because of the joinder of several defendants, each holding separate, independent and distinct titles, having no connection whatever with each other, the bill is multifarious.

The reason for the rule against multifariousness is, the inconvenience of mixing up distinct matters which may require different proceedings or decrees and embarrass the defendant or defendants in the proper defense of each. (Story's Equity Pleading, Sec. 280; Cooper's Equity Pleading 183.) Among the various tests by which to determine whether or not a bill is multifarious, we call attention to the following:

1. Is there any connection between the transactions referred to?
2. Would each transaction be more properly determined without reference to the others?
3. Would evidence relevant to one be wholly irrelevant to others?
4. Would separate decrees be necessary?
5. Would the relief be properly separate and exclusive as to each case and each defendant under the allegations of each of the bills?

Every one of the tests defined by the authorities as a ground for multifariousness is present. Each one of these transactions is separate and distinct and depends on proof that would in no wise affect any other; evidence relevant to one would be wholly irrelevant to the others; separate trials, different evidence and separate decrees will be necessary and the relief, if any is granted, must be separate and exclusive as to each transaction and as to each defendant. If there is a cause of action existing against thousands of persons made parties defendant to these suits, it exists in favor of thousands of other citizens of the United States. If a cause of action exists, it is not in favor of the United States, but in favor of divers citizens of the United States. These bills are brought not upon any cause of action existing in favor of appellants, but upon supposed causes of action existing in favor of several thousand citizens of the United States residing in the State of Oklahoma and elsewhere and against several thousand other citizens and residents of the State of Oklahoma. Between five and ten thousand controversies between twice that number of citizens of the United States are to be tried in a very limited number of suits. If the ten thousand defendants against whom the suits are brought owe to the ten thousand citizens of the United States on whose behalf they are brought, separate notes for \$1,000.00 each, given for the purchase price of said lands, there would be just as much reason for sustaining a joinder of defendants in a suit brought by the United States on behalf of the allottees who are citizens of the United States to recover on these ten thousand notes, as there would be to cancel the conveyances involved.

The validity of each conveyance must depend upon the facts of the individual case. That the cases can be disposed of upon questions of law will not be seriously contended by anyone who is familiar with the records. Although there is some conflict among the cases as to when a single plaintiff may main-

tain a suit against numerous defendants, it is believed in the Federal courts, at least, the law is fairly well settled by the decision in *Hale v. Allinson*, 188 U. S. 56.

This Court adopted as its exposition of the law the opinion of McPherson, District Judge, reported in 102 Federal Reporter 790, as follows:

"Thereafter a different question arose for determination, namely, can the assessment be lawfully enforced against the individual charged herewith, and in this question the interest of each stockholder is separate and distinct. The bill asserts the conclusiveness of the Minnesota decree upon the defendants, so far as the necessity for the assessment and the amount charged against each stockholder are concerned. (*Bank v. Farnum*, 176 U. S. 640.) Assuming that position to be sound (and, if I do not assume it; if these questions are still open for determination, so far as the Pennsylvania stockholders are affected, the bill must fail for want of necessary parties), it is clear that only two classes of questions remain to be decided; the first is whether a given stockholder was ever liable in such; and the second is whether, if he were originally liable, his liability has ceased, either in whole or in part. Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defense, and defenses may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defenses are put in by differing defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff who has similar claims against many persons. But as each of these persons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his co-defendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and

not they, has done nothing to discharge the liability. Suppose A to aver that his signature to the subscription list was forgery; what connection has that averment with B's contention that his subscription was made by an agent who exceeded his powers? Or with C's defense that his subscription was obtained by fraudulent representations, or with D's defense that he discharged his full liability by a voluntary payment to the receiver himself? Or with E's defense, that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defenses, having nothing in common; and upon each, the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional rights. But, even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose conveniences must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of the witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law.

We are in accord with the views thus expressed and we therefore must deny the jurisdiction of equity, so far as it is based upon the asserted prevention of a multiplicity of suits."

Mr. Pomeroy's statement of the law, in his First and Second editions, was so broad as to bring unlimited criticism. To meet the criticism upon the broad statement of the right to maintain such suits, two paragraphs were inserted in the Third Edition, being numbered 251½ and 251¾. The statement of the law as contained in Section 251½, Vol. 1, page 371, is as follows:

"Jurisdiction Not Exercised When That Would Be Ineffectual: Simplifying of the Issues Essential.—It seems desirable to further emphasize and illustrate the author's statement that in cases apparently falling within classes third and fourth, where the jurisdiction depends on the multitude of plaintiffs or defendants, 'there must be some common relation, some common interest on some common question' in order that the one proceeding in equity may really avail to prevent a multiplicity of suits. The equity suit must result in a simplification or consolidation of the issues; if, after the numerous parties are joined, there still remain separate issues to be tried between each of them and the single defendant or plaintiff, nothing has been gained by the court of equity's assuming jurisdiction. In such a case, 'while the bill has only one number upon the docket and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon the separate and distinct liability of one defendant,' in cases resembling those of fourth class, or upon the separate and distinct claim of one plaintiff, in cases resembling those of the third class. In refusing to entertain these spurious 'bills of peace,' courts of equity impose no real limitation upon their jurisdiction, which by its very definition, exists not because of multiplicity of suits, but to avoid them, when their rules of procedure can avail to that purpose; indeed they merely apply to bills of this character the ordinary rules of equity pleading relating to multifariousness."

In note to this section, on page 371, attention is called to the case of *Best v. Drake*, 11 Hare, 371, reporting a case somewhat parallel to the case at bar. The note is as follows:

"A bill in chancery was this term preferred by a widow against 500 persons, to answer what moneys they owed her husband; the bill was above 3,000 sheets of paper, to the wonder of most people; but the Lord Chancellor looking on it as vexatious, for it would cost each defendant a 100*l.* the copying out, he dismissed the bill, and ordered Mr. Newman, the concellour, whose hand was to it, to pay the defendants the charges they had been at."

Multifariousness as described by the Circuit Court of Appeals for the Fourth Circuit, in the case of *Barcus et al v. Gates*, 89 Fed. 783, 791, is as follows:

"Multifariousness arises from the fact either that the transactions which form the subject matter of the suit are so separate and dissimilar that they cannot conveniently be tried in one record, or that some defendant is able to say that as to a large part of the transactions set out in the bill he has no interest or connection whatever. A bill is not multifarious because there are several causes of action, if they grow out of the same transaction, and if all of the defendants are interested in the same rights, and the relief against each is of the same general character, the bill may be sustained."

In *Gaines v. Chew*, 2 How. 619, the Supreme Court of the United States held the following tests of multifariousness in a bill:

"In general terms, a bill is said to be multifarious which seeks to enforce against different individuals demands which are wholly disconnected. An illustration of this, it is said, if an estate be sold in lots to different persons, the purchaser could not join in exhibiting one bill against the vendor for a specific performance. Nor could the vendor file a bill for a specific performance against all the purchasers. The contracts of purchase being distinct, in no way connected with each other, a bill for a specific execution, whether filed by the vendor or vendees, must be limited to one contract."

This case is quoted with approval and this doctrine reaffirmed in the case of *Brown v. Guaranty Trust Co.*, 128 U. S. 403, 410.

The application of the principles contained in the last mentioned case would, of necessity, result in declaring the bill involved multifarious.

The Court's attention is also called to the case of *Tribbett et al v. Illinois Central Ry. Co.*, 70 Miss. 182, 12 So. 32; *Turner*

v. *City of Mobile*, an Alabama case reported in 33 Southern 132; *Van Auken v. Dammeier*, 40 Pac. 89; *Tonkins v. Craig*, 93 Fed. 885.

These cases disclose that the question of whether the bill is multifarious or not need not necessarily be determined upon the face of the bill; that consideration should be given to issues that might be made by the several defendants upon the allegations contained in the bill. If separate and individual defenses may be made by each of the defendants, then the bill is multifarious within the rule laid down in *Hale v. Allinson*. As Judge McPherson said, in dismissing the bill in the trial court:

“Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose conveniences must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions of law.”

This is a perfect description of the condition of pending case. If the rule declared by Judge McPherson and approved by this Court in *Hale v. Allinson*, *supra*, is to be followed, it is difficult to see how it can be held that the bill in this case is not multifarious or that it states a cause of action upon which equitable relief may be invoked.

Referring again briefly to the issues that may be made by answer interposed by the defendants, if they are required to answer; for instance, it is suggested in the bill (and we do not believe the suggestion in the form in which it is made arises to the dignity of an allegation) that the several allottees have full blood heirs, or perhaps in some cases that the grantor is an heir and a full blood. The conveyances herein involved were

all made prior to the time Congress undertook to declare the rolls prepared by the Secretary to be conclusive of the quantum of Indian blood. It is a matter of public notoriety that of the members of the Five Civilized Tribes who are enrolled as full bloods many are not full bloods. There seems to have been prevalent an opinion at the time the enrollment was made that a full blood would perhaps fare a little better than one of less Indian blood. No doubt, in many instances, a direct issue will be raised as to the quantum of Indian blood. A full-blood Indian will have heirs, some of whom are full bloods and some of much less degree Indian blood, and this is frequently the case. This illustration, notwithstanding the contention made by the United States, that the question presented is one of law, that it is not only possible but entirely probable that a myriad of questions of fact will arise in many, if not in all, of these cases. Issues differing with each individual transaction and having no relation whatever to each other.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

P. E. HECKMAN AND ROBERT L. OWEN, appellants, v. THE UNITED STATES.	 No. 496.
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*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.*

**BRIEF AND ARGUMENT OF THE UNITED STATES ON THE
SPECIAL QUESTION OF ALIENABILITY OF LANDS
INVOLVED IN THIS SUIT.**

STATEMENT.

This brief is supplemental to the brief filed by the Government on the three general questions passed upon by the Circuit Court and the Circuit Court of Appeals: (1) Capacity in the United States to sue; (2) defect of parties; and (3) multifariousness, and is directed solely to a discussion of the special question of the alienability of the

lands involved in the bill at the date of the execution of the conveyances complained of therein.

This appeal involves lands allotted to Cherokee Indians. The United States as complainant has heretofore filed 46 bills seeking to have canceled attempted conveyances to the number of 3,715, all involving lands of Cherokee Indians. In each bill are grouped all conveyances covering lands belonging to a certain class. There are 11 of these classes designated for the Cherokee bills. This appeal before the court has to do with the eleventh class—conveyances by citizens of the Cherokee Nation of the full blood of lands allotted subsequent to the act of April 26, 1906—and there are 17 conveyances of this class and 12 defendants involved in this appeal. There are pending in the Circuit Court 2 other bills of the same class, in which are included 98 other instruments alleged by the Government to be invalid and in which are involved 6 grantees named as defendants.

A determination of the validity of the instruments included in this appeal will settle the question of the alienability of the lands involved in each conveyance complained of in all the bills of this class as well as of many other like conveyances which have not yet been made the subject of suit. In each of the instruments complained of the grantor is an allottee of the Cherokee Nation of the full blood, the land included is land allotted to him, and the certificate of his right to that land was delivered subsequent to April 26, 1906.

The third paragraph of the bill alleges (R., 3) that Congress by an act approved July 1, 1902 (32 Stat., 716), provided that lands allotted to the members of the Cherokee Tribe of Indians as homesteads should be inalienable and that lands allotted other than homesteads should not be alienable until five years after the issuance of patent to the allottee, and that the said act of Congress was duly accepted and ratified by the Cherokee people on the 7th day of August, 1902.

The fourth paragraph of the bill alleges (R., 3 and 4) that each of the tracts of land involved in the bill had been allotted to a full-blood Indian of the Cherokee Tribe of Indians, who appears in each transaction complained of as grantor, and that the said lands were subject to restrictions upon their alienation and incumbrance at the date of the execution and recording of the deeds and other instruments of writing set out, which restrictions have never been removed and still exist.

The Circuit Court, having sustained the demurrers to the bills on other grounds, did not pass upon the special question of alienability, and this was assigned as error in the appeal to the Circuit Court of Appeals. (16th assignment of error, R., 47.)

On the appeal to this court the appellants assign as error (ninth) that the court erred in reversing the judgment of the trial court without having first determined that the lands sued for were subject to restrictions upon alienation, (twelfth) that the

court erred in holding that Congress could enlarge or extend restrictions upon alienation, and (fourteenth) that the court erred in holding that the conveyances of sale were made in violation of law. (R., 72.)

In this brief will be set out:

I. The portions of treaties and acts of Congress necessary to the full discussion of the question of alienability of the lands involved.

II. The argument for the Government in which it is contended that not only were the conveyances complained of, at the date of their execution, taken by the appellants in violation of the provisions of the treaties and acts of Congress imposing restrictions upon the lands included therein, but also that the class of lands involved has always been and is now restricted as to its alienation.

I.

TREATIES AND ACTS OF CONGRESS APPLICABLE.

The act of July 1, 1902 (the Cherokee agreement; 32 Stat., 716), makes provision for the allotment of land to the members of the Cherokee Tribe and restricts its alienation in the following sections (p. 717):

Sec. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall

be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be non-taxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

Sec. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

Sec. 15. All lands allotted to members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

The act of April 26, 1906 (34 Stat., 137-148), extends to a period of 25 years the time within which Indians of the full blood of each of the Five Civilized Tribes were forbidden to alienate, sell, dispose of, or encumber any of their lands.

Sec. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such

restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided*, however, that such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be

subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee. (34 Stat., 144.)

* * * * *

Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper Court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such Court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe (p. 145).

Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the

parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner (p. 145).

The last act upon the subject of the alienation of Indian lands, the act making the appropriation under which the large number of suits of which the one now before the court is one, is the act of May 27, 1908 (35 Stat., 312), and enacts these provisions:

That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell,

power of attorney, or any other incumbrance prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an Act entitled "An Act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-Second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma. (35 Stat. 312.)

* * * * *

Sec. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall

not be subjected or held liable, to any form of personal claim or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law (p. 313).

Sec. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void (p. 313).

* * * * *

Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the Court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of

the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of Section twenty-three of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section (p. 315).

II.

ARGUMENT.

THE LANDS INCLUDED IN THE ATTEMPTED CONVEYANCES INVOLVED IN THIS APPEAL WERE RESTRICTED AS TO THEIR ALIENATION (A) BY THE ACT OF JULY 1, 1902; THE RESTRICTIONS WERE EXTENDED (B) BY THE ACT OF APRIL 26, 1906, AND WERE RETAINED (C) BY THE ACT OF MAY 27, 1908.

A. The act of July 1, 1902, placed restrictions upon the alienation of the lands involved.

Section 13 of the act of July 1, 1902 (32 Stat., 716, 717), provides that each member of the Cherokee Tribe should designate a homestead out of the lands selected as an allotment by him, which should be inalienable during the lifetime of the allottee, not exceeding 21 years from the date of the certifi-

cate of allotment, nontaxable and not liable for any debt while held by the allottee. This section affects the land allotted as homestead only, and while the restriction is directed toward it while in the hands of the allottee himself, it is maintained that having once attached the wording compels the conclusion that future specific legislation is necessary to remove it, even after the death of the allottee. (*Goodrum v. Buffalo*, 162 Fed. Rep., 817.) In so far as the lands of citizens of the full blood are concerned this has not yet been done.

Section 14 *prohibits* the alienation of his land by the allottee or his heirs before the expiration of five years from the date of ratification of the act. In this section there is an indication of the intention of Congress that the wording of the restrictions in section 13 prohibits the alienation of lands allotted as homestead beyond the death of the allottee and until further legislation, but not exceeding the period of 21 years. In section 14 homesteads, and lands other than homestead allotments, are not distinguished, but the prohibition concerns "lands" of the allottee.

A hasty consideration of section 15 might cause the conclusion that its terms are in conflict with those of the preceding section with regard to lands allotted other than homesteads. It is necessary to distinguish between the *prohibition* in section 14 against alienating lands before the expiration of five years from the date of the ratification of the act, which period expired August 7, 1907, and the

affirmative provision, in section 15, that lands other than homesteads shall be alienable in five years after issuance of patent. If the alienability of the land allotted to citizens of the Cherokee Nation was being considered with reference to provisions of section 14 *only*, and in the absence of subsequent legislation affecting those lands (act of April 26, 1906, and act of May 27, 1908), and it should be determined under those conditions that the negative provisions of that section resulted in an affirmative removal of the restrictions subsequent to the expiration of five years from the date of the ratification of the act of July 1, 1902, the validity of some of the attempted conveyances by citizens of the full blood sought to be canceled in the case now being considered would be established, having been executed subsequent to August 7, 1907. On the other hand, without regard to the acts of 1906 and 1908, the positive provisions of section 15 *permitted* alienation of lands other than homesteads not until the expiration of five years after *issuance* of *patent*. The date of the issuance of patent to the lands involved in each of the instruments complained of in the case being considered was subsequent, and in many instances long subsequent, to the date of the ratification of the act. Under this positive enactment alone none of the attempted conveyances set out in the record (R., 5-10) are valid.

If it is considered that the *prohibition* of alienation, contained in section 14, for five years after ratification of the act *permits* alienation *after* five

years, it is important to decide whether or not there are two restriction periods—one beginning in 1902 and the other from the date of the issuance of patent. From a comparison of the wording of the two sections (and in this connection section 13) it is evident that Congress did not intend to remove restrictions by section 14, but to designate a period at the end of which, *at the earliest*, the allottees would be permitted to alienate their lands by some positive enactment—a promise or an agreement not to allow lands to be encumbered, taken, or sold to secure or to satisfy any debt or obligation or be alienated by the allottee or his heirs for *at least* five years from the date of the ratification of the agreement. It will be noticed, too, that voluntary alienation is given a subordinate place in the section and a more prominent position given to encumbering, taking, and selling to secure or satisfy debts and obligations. It would appear that subsequently in the consideration and in the building of the act the affirmative provision of section 15 was inserted. Provision had already, in section 13, been made prohibiting the alienation of homesteads, and in section 15 provision is made for the alienation of lands other than homesteads. If there is a conflict between sections 14 and 15, there is one between 13 and 14, for section 14 includes homesteads already provided for in section 13.

The doctrine is familiar that the language of a statute is to be interpreted in the light of the particular matter in hand and the ob-

ject sought to be accomplished as manifested by other parts of the act, and the words used may be qualified by their surroundings and connections. (*Cherokee Inter-marriage Cases*, 203 U. S., 76, 89.)

* * * It is not by detached words and phrases that a statute ought to be expounded. The whole act must be taken together, and a fair interpretation given it, neither extending nor restricting it beyond the legitimate import of its language, and its obvious policy and object. (*Gayler v. Wilder*, 10 How., 477, 496.)

That a law is the best expositor of itself, that every part of an act is to be taken into view, for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged. (*Pennington v. Core*, 2 Cranch., 33, 52.)

Manifestly Congress intended the homestead of a citizen to be longer restricted than other lands. If the provisions of section 14 permit alienation, the provisions of section 13 with regard to homesteads are rendered nugatory and the intended protection disapproved. So, too, section 13 provides that during the time the homestead is held by the allottee it shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while

so held by him. If section 14 affirmatively removes restrictions after five years from the date of the ratification of the act this provision of section 13 is avoided.

All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it. (*Bernier v. Bernier*, 147 U. S., 242, 246.)

This intention in the Cherokee agreement to protect the lands of the Indians and especially lands of Indians of the full blood, both surplus and homestead, is again manifested and made clear in the act of April 26, 1906, and also in the last act (May 27, 1908).

* * * if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them. (*U. S. v. Freeman*, 3 How., 556, 564.)

* * * In cases admitting of doubt the intention of the law maker is to be sought in the entire context of the section—statutes, or series of statutes *in pari materia*. (*Atkins v. Fibre Disintegrating Co.*, 18 Wall., 272, 301.)

Section 15 is more valuable to the Indian and from the point of view of the policy of the Government the protection of the Indian should control.

* * * By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from

the standpoint of the Indians. (*Winters v. U. S.*, 207 U. S., 564, 576.)

The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. (*Worcester v. Georgia*, 6 Pet., 515, 581.)

The Attorney General expressed his opinion, August 20, 1907, to the Secretary of the Interior (26 Op., 351, 354) that the clear and specific statements in section 15 should be taken as making definite and certain the interpretation to be given the *negative* expression in section 14, and his view that it was the purpose of Congress at that time to keep the allottee in possession of his lands for five years so that he might become familiar with the value of his allotment and be better fitted to dispose of it, and the purpose defeated if the restriction period expired in five years from the date of the ratification of the agreement instead of five years from the date of issuance of patent, has been borne out by the facts. In many instances the five years in section 14 had elapsed before allotment. The opinion is set out in full:

DEPARTMENT OF JUSTICE,

August 20, 1907.

SIR: By your letter of August 6, 1907, you request my opinion upon the following ques-

tions arising in the administration of your Department of the laws relating to the alienation of Cherokee lands in the Indian Territory:

“ 1. Will citizens of the Cherokee Nation be lawfully entitled, under the act of July 1, 1902 (32 Stat., 716), to alienate lands allotted to them, except homesteads, after the expiration of five years from August 7, 1902; i. e., after the expiration of five years from the date of the ratification of said act, or will such lands be alienable in the case of each allottee in five years after the issuance of patent to him?

“ 2. To what extent, if any, is the right of alienation under said act of July 1, 1902, affected by the provisions of the Act of April 21, 1904 (33 Stat., 189), relative to the removal of restrictions upon alienation from all citizens, and the act of April 26, 1906 (34 Stat., 137), relative to the alienation of lands allotted to full-blood Indians? ”

The act of July 1, 1902 (32 Stat., 716), providing for the allotment of the lands of the Cherokee Nation, contains the following provisions:

“ Sec. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from

the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be non-taxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

“Sec. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

“Sec. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.”

The Indian appropriation act of July 21, 1904 (33 Stat., 189, 204), provided:

“And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian Agent at the Union Agency in charge of the Five Civilized Tribes, if said agent

is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee."

The Act of April 26, 1906 (34 Stat. 137, 144), providing for the final disposition of the affairs of the Five Civilized Tribes, provides:

"Sec. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior; Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations."

1. In regard to your first inquiry, I think the clear and specific statements in section 15

of the act of July 1, 1902, that "all lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent," should be taken as making definite and certain the interpretation to be given the negative expression in the previous section that such lands should not, among other things "be alienated by the allottee or his heirs before the expiration of five years from the date of the ratification of this act." As the purpose of the five-year restriction upon alienation presumably was to keep the allottee in possession of his allotment for that length of time, so that he might acquire knowledge of its value and uses and be better fitted to dispose of it, such purpose might be impaired and perhaps altogether defeated if the date from which the restrictive period was to commence were held to be that of the ratification of the act, as many members might not have received their allotments until long after the ratification of the act, and in some cases not until after the expiration of five years from that time. It will be observed that by section 13 the time when homesteads were to become alienable was fixed at "not exceeding twenty-one years from the date of the certificate of allotment," upon the receipt of which certificate by section 21 of the act the allottee became entitled to be put in possession of his allotment.

This view, it will be observed, satisfies the well-settled rule "that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." (*Market Co. v. Hoffman*, 101 U. S. 116; Sedgwick on State Const. Law, 238; Wilberforce's Statute Law, 111.)

2. Your second question is as to the effect of the provision of the act of April 21, 1904, in regard to the removal of restrictions upon alienation from all citizens and that of the act of April 26, 1906, relative to alienation by full bloods upon the right of alienation under the act of July 1, 1902.

The construction of the statutes referred to seems perfectly clear. By the act of April 21, 1904, all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes who are not of Indian blood, except minors, are, except as to homesteads, removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors and except as to homesteads, are authorized to be removed upon certain conditions. The provision of this act authorizing the removal of restrictions, as well as the original five year restriction as to surplus lands and the twenty-one year restriction as to homesteads, in the act of July 1, 1902, were, however, superseded as to full bloods by the provisions of section 19 of the act of April 26, 1906, which forbids full bloods to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to them for

a period of twenty-five years from and after the passage and approval of that act, unless such restrictions shall, prior to the expiration of said period, be removed by act of Congress, with the proviso as to leasing.

Respectfully,

CHARLES J. BONAPARTE.

THE SECRETARY OF THE INTERIOR.

B. The act of April 26, 1906, extended the restrictions.

The lands involved in the Cherokee case before the court being lands other than homesteads allotted to Cherokee citizens of the full blood subsequent to April 26, 1906, were taken out of the operation of the restriction provisions of the Cherokee agreement of 1902 by the provisions of the act of April 26, 1906. (34 Stat., 137-148, secs. 19, 22, and 23.)

These provisions superseded those of the Cherokee agreement as to citizens of the full blood and the alienation period as to them was extended 25 years (sec. 19). The full-blood heirs of a deceased allottee were permitted to convey inherited lands subject to the approval of the Secretary of the Interior (sec. 22), and a citizen of the full blood could by will devise his estate provided, if it disinherited the parent, wife, spouse, or children, it was acknowledged before and approved by a judge of the United States Court for the Indian Territory or a United States Commissioner (sec. 23).

Among the provisions in section 19 is, "*Provided further, That conveyances heretofore made by*

members of any of the Five Civilized Tribes *subsequent* to selection of allotment and *subsequent* to removal of restrictions where patents thereafter issue shall not be deemed or held invalid solely because said conveyances were made prior to issuance and the recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be, and the same is hereby, declared void."

In this act of April 26, 1906, is found an expression of the policy of Congress to protect the Indian full blood, the class concerned in this appeal, for a greater length of time than was provided in the act of July 1, 1902. By the provisions of the former act the land allotted to Indians of the Cherokee Nation other than homesteads became alienable five years after the issuance of patent. Lands allotted as homestead could not be alienated for 21 years. The act of April 26, 1906, prohibits the alienation of *all* lands allotted to an Indian of the full blood, homestead and lands other than homestead, for a period of 25 years from and after the passage and approval of the act unless restrictions shall be removed by act of Congress prior to the expiration of such periods. The full-blood heirs of a deceased Indian are also protected in the possession of lands inherited by them, it being re-

quired (sec. 22) that conveyances by them are subject to the approval of the Secretary of the Interior.

The restrictions in the act of 1902 were still in effect when Congress extended them by the act of 1906.

Under the provisions of the act of April 26, 1906 (34 Stat., 137), there can be no question of the invalidity of all the conveyances complained of included in this appeal. No other authority is necessary than the recently decided case of *Marchie Tiger v. The Western Investment Co. et al.* (221 U. S., 286). The constitutionality of that act is determined in no uncertain terms. Section 19 extends the restrictions imposed by the act of July 1, 1902 (Cherokee agreement), and forbids alienation for 25 years unless Congress otherwise provides, the obvious purpose of Congress being to further protect the full-blood Indian.

One of the concluding paragraphs of this court's decision in the case of *Marchie Tiger v. The Western Investment Co. et al.*, *supra*, disposes of the contentions that section 19 is unconstitutional legislation because impairing the title of the classes of Indians mentioned (p. 316):

Upon the matters involved our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the

Indian's lands inherited from allottees as shown in this case; that in the present case when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian.

The reasoning of the court in construing section 22 of the act of April 26, 1906, is equally applicable to section 19, and the facts in this appeal are stronger, the allottees being the grantors and the allotments involved therein having been made subsequent to the approval of the act of April 26, 1906.

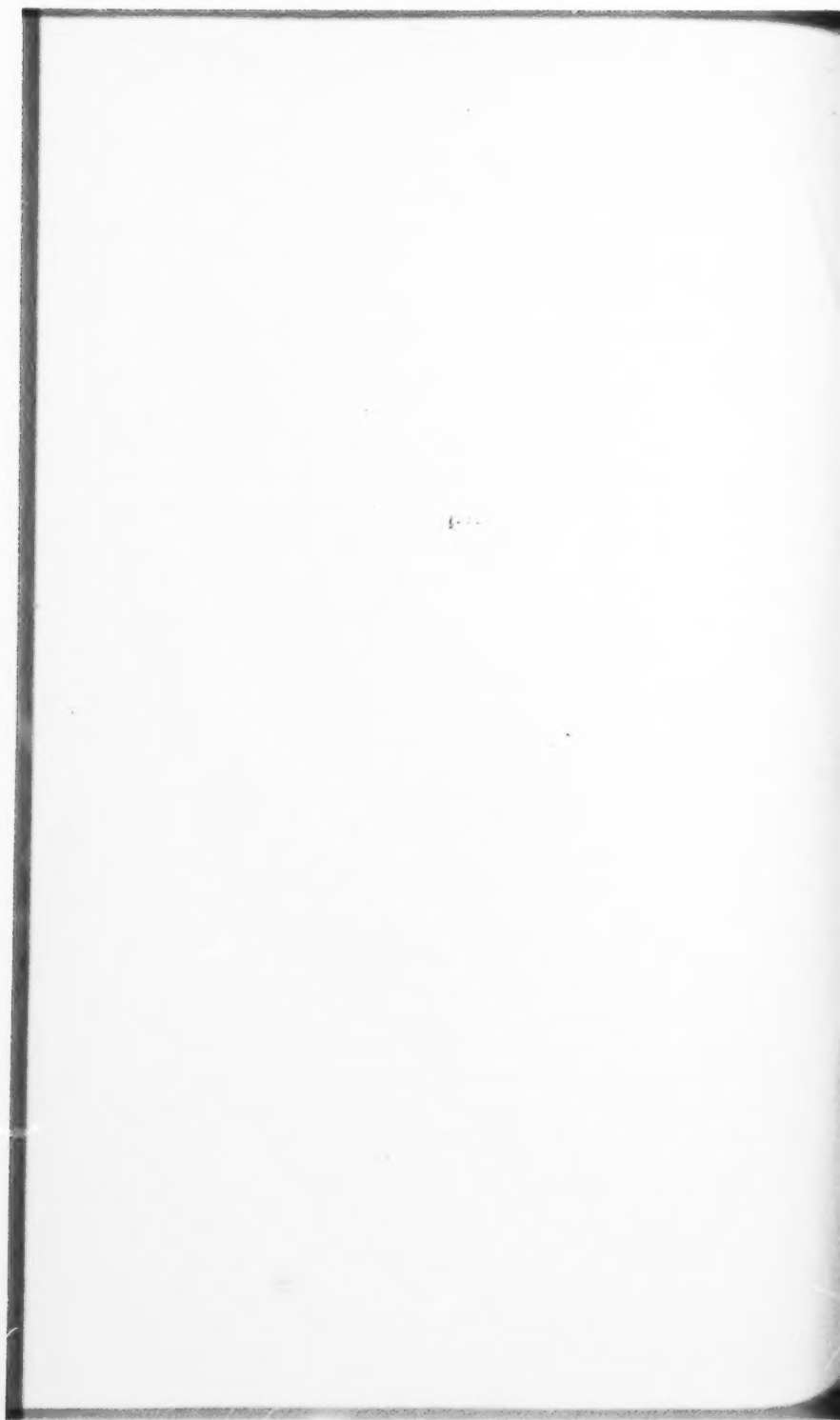
C. The act of May 27, 1908, has retained the restrictions.

That it is still the purpose of Congress to exercise its supervision over the Indians of the Five Civilized Tribes and to enact such legislation for their protection as may seem wise and consistent with its long-continued policy is manifest in its last enactment (act of May 27, 1908, 35 Stat., 312). Congress has not yet deemed it wise that governmental guardianship over the Indian shall cease.

Section 1 of the act of May 27, 1908, forbids the alienation of all allotted lands of Indians of the Five Civilized Tribes of the full blood prior to April 26, 1931, subject, however, to the removal of restrictions by the Secretary of the Interior under rules and regulations prescribed by him. Section 4 provides that allotted lands shall not be subjected or held liable to any form of personal claim or demand against the allottees arising or existing prior to the removal of restrictions other than contracts heretofore expressly permitted by law. Section 5 in very positive terms makes absolutely null and void every kind of alienation or incumbrance of allotted lands prior to removal of restrictions. Just as the act of April 26, 1906, comprehensively superseded the provisions of the Cherokee agreement relating to restrictions, so the last act superseded the provisions of the act of April 26, 1906. This last act, too (sec. 6, p. 315), makes the first appropriation for expenses in bringing the great number of suits, of which this is one, "to acquire or retain possession of restricted Indian lands or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof."

A. N. FROST,
HARLOW A. LEEKLEY,

Special Assistants to the Attorney General.
OCTOBER, 1911.



TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911

No. 404

J. B. MULLEN AND W. B. JANSEN, APPELLANTS,

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

FILED OCTOBER 2, 1912.

(22,333.)

(22,333.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 712.

J. S. MULLEN AND W. B. JANSEN, APPELLANTS,

v8.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, A. D. 1910, of said Court, Before the Honorable William C. Hook and the Honorable Elmer B. Adams, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the seventeenth day September, A. D. 1909, a transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain cause wherein The United States of America was Appellant and Charles E. McPherren, et al., were Appellees, which said transcript of record is in the words and figures following, to-wit:

In the Circuit Court of the United States, Eastern District of Oklahoma.

No. —.

THE UNITED STATES, Appellant,
vs.
CHARLES E. MCPHERREN et al., Appellees.

The following is a transcript of such of the record and proceedings heretofore had in said case as has been ordered to be prepared and authenticated as necessary to the hearing in the Court of Appeals:

(a). The Bill of Complaint was filed in the office of the Clerk on the 17th day of July, 1908, and, with the endorsements thereon, except as to those transactions in paragraph six of the bill as to which special orders of dismissal upon the petition of the complainant have been heretofore entered, is as follows:

3 In the Circuit Court of the United States for the Eastern District of Oklahoma.

In Equity. No. 307.

THE UNITED STATES OF AMERICA, Complainant,

vs.

CHARLES E. MCPHERREN et al., Defendants.

To the Honorable Judge of the Circuit Court of the United States for the Eastern District of Oklahoma:

The United States of America, by Charles J. Bonaparte, Attorney-General of the United States, and William J. Gregg, United States Attorney for the Eastern District of Oklahoma, brings this bill, upon the recommendation of the Secretary of the Interior, against:

4 Charles E. McPherrren; of Caddo, Oklahoma, a Citizen of the State of Oklahoma; Howard West, of Ada, Oklahoma, a citizen of the State of Oklahoma; Ida B. Bently, of Shawnee, Oklahoma, a citizen of the State of Oklahoma; Alvin F. Pyeatt, of Pauls Valley, Oklahoma, a citizen of the State of Oklahoma; Albert Renne, of Pauls Valley, Oklahoma, a citizen of the State of Oklahoma; W. B. Janson, of Chicago, Illinois, a citizen of the State of Illinois; D. G. Flanniken, of Paris, Texas, a citizen of the State of Texas; Joseph M. Bettes, of Paris, Texas, a citizen of the State of Texas; J. B. Mills, of Glenn, Oklahoma, a citizen of the State of Oklahoma; Fort Towson Land & L. Co., of Fort Towson, Oklahoma, a corporation incorporated under the United States Laws in force in Indian Territory. Principal place of business, Fort Towson, Oklahoma; W. S. Farmer, of Atoka, Oklahoma, a citizen of the State of Oklahoma; W. G. Flenniken, of Paris, Texas, a citizen of the State of Texas; A. E. Perry, of Coalgate, Oklahoma, a citizen of the State of Oklahoma; J. S. Mullen, of Ardmore, Oklahoma, a citizen of the State of Oklahoma; L. V. Mullen, of Ardmore, Oklahoma, a citizen of the State of Oklahoma; F. R. Hedricks; of South Omaha, Nebraska, a citizen of the State of Nebraska; Jas. Ables, of Durant, Oklahoma, a citizen of the State of Oklahoma; A. G. Ethridge, of Idabel, Oklahoma, a citizen of the State of Oklahoma; I. L. Cook, of Idabel, Oklahoma, a citizen of the State of Oklahoma; W. R. Jeffrey, of Barwick, Oklahoma, a citizen of the State of Oklahoma; E. E. Davis, of Denison, Texas, a citizen of the State of Texas; D. C. McCalib, of Denison, Texas, a citizen of the State of Texas; John J. Cravens, of Durant, Oklahoma, a citizen of the State of Oklahoma; C. H. Colbert, of Durant, Oklahoma, a citizen of the State of Oklahoma; Hugh Simpson, of Ft. Smith, Arkansas, a citizen of the State of Arkansas; C. J. Ralston, of Caney, Oklahoma, a citizen of the State of Oklahoma; W. R. Ritchie, of Caney, Oklahoma, a citizen of the State of Oklahoma; R. R. Hall, of Caney, Oklahoma, a citizen of the State of Oklahoma; M. L. Franklin, of Durant, Oklahoma, a citizen of the State of Oklahoma;

5 L. C. Hocher, of Byars, Oklahoma, a citizen of the State of Okla-

homa; J. W. Humphrey, of Atoka, Oklahoma, a citizen of the State of Oklahoma; E. A. Newman, of Atoka, Oklahoma, a citizen of the State of Oklahoma; W. W. Morris, of Atoka, Oklahoma, a citizen of the State of Oklahoma; W. H. Ritchie, of Wapanucka, Oklahoma, a citizen of the State of Oklahoma; R. R. Hall, of Wapanucka, Oklahoma, a citizen of the State of Oklahoma; C. J. Ralston, of Wapanucka, Oklahoma, a citizen of the State of Oklahoma; J. T. Petty, of Caddo, Oklahoma, a citizen of the State of Oklahoma; W. C. Hull, of Caddo, Oklahoma, a citizen of the State of Oklahoma; H. M. Dunlap, of Caddo, Oklahoma, a citizen of the State of Oklahoma; David F. Le Master, of South McAlester, Oklahoma, a citizen of the State of Oklahoma; D. W. Humphreys, of Parnell, Missouri, a citizen of the State of Missouri; W. Chenault, of Tishomingo, Oklahoma, a citizen of the State of Oklahoma; V. Bronaugh, of Boswell, Oklahoma, a citizen of the State of Oklahoma; G. D. Duncan, of Boswell, Oklahoma, a citizen of the State of Oklahoma; Chas. S. Lynch, of Boswell, Oklahoma, a citizen of the State of Oklahoma; E. E. Wilkins, of Boswell, Oklahoma, a citizen of the State of Oklahoma; N. C. Hocker, of Byars, Oklahoma, a citizen of the State of Oklahoma; William L. Reed, of Ada, Oklahoma, a citizen of the State of Oklahoma; G. D. Hodges, of Coalgate, Oklahoma, a citizen of the State of Oklahoma; L. Fountain, of Wapanucka, Oklahoma, a citizen of the State of Oklahoma; A. J. Waldoek, of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; E. O. Butler, of Durant, Oklahoma, a citizen of the State of Oklahoma; J. C. Terrell, of Durant, Oklahoma, a citizen of the State of Oklahoma; P. O. Stover, of Marlow, Oklahoma, a citizen of the State of Oklahoma; Wm. H. Payne, of Marlow, Oklahoma, a citizen of the State of Oklahoma; J. T. Hill, of Marlow, Oklahoma, a citizen of the State of Oklahoma; C. T. Erwin, of Chickasha, Oklahoma, a citizen of the State of Oklahoma; J. Edgar White, of Tishomingo, Oklahoma, a citizen of the State of Oklahoma; F. M. Fox, of Ardmore, Oklahoma, a citizen of the State of Oklahoma; Mike Feyer, of Coalgate, Oklahoma, a citizen of the State of Oklahoma; American Investment Co., of Atoka, Oklahoma, a corporation incorporated under the laws of the United States formerly in force in Indian Territory, Principal place of business, Atoka, Oklahoma; W. H. Walker, of Tishomingo, Oklahoma, a citizen of the State of Oklahoma; G. J. Humphreys, of Ardmore, Oklahoma, a citizen of the State of Oklahoma; Nelson H. McCoy, of Ardmore, Oklahoma, a citizen of the State of Oklahoma; Thos. J. Sanford, of Ardmore, Oklahoma, a citizen of the State of Oklahoma; J. H. Jackson, of De Queen, Arkansas, a citizen of the State of Arkansas; Ed Stewart, of De Queen, Arkansas, a citizen of the State of Arkansas; J. W. Hocker, of Purcell, Oklahoma, a citizen of the State of Oklahoma; B. C. Harbert, of Robb, Oklahoma, a citizen of the State of Oklahoma; John Casteel, of Robb, Oklahoma, a citizen of the State of Oklahoma; Perry G. Lanham, of Ada, Oklahoma, a citizen of the State of Oklahoma; E. L. Webb, Hillsboro, Texas, a citizen of the State of Texas; T. M. Dumas, of Madill, Oklahoma, a citizen of the State of Oklahoma; F. E. Riddle, of Chickasha, Oklahoma, a citi-

zen of the State of Oklahoma; E. G. Owens, of Chickasha, Oklahoma, a citizen of the State of Oklahoma; G. C. Murray, of Colbert, Oklahoma, a citizen of the State of Oklahoma; Nellie Johnson, of Paris, Texas, a citizen of the State of Texas; U. S. Joins, of Ardmore, Oklahoma, a citizen of the State of Oklahoma; H. S. Gilbert, of Ardmore, Oklahoma, a citizen of the State of Oklahoma; H. B. Low, of Ardmore, Oklahoma, a citizen of the State of Oklahoma; W. J. Gilbert, of Ardmore, Oklahoma, a citizen of the State of Oklahoma; William L. Sawyers, of Chickasha, Oklahoma, a citizen of the State of Oklahoma; S. E. Hill, of Marlow, Oklahoma, a citizen of the State of Oklahoma; C. B. Hill, of Marlow, Oklahoma, a citizen of the State of Oklahoma; Walter P. Hopkins, of Eagletown, Oklahoma, a citizen of the State of Oklahoma; W. Chenoult, of Tishomingo, Oklahoma, a citizen of the State of Oklahoma; 7 Erie C. Watkins, of Lamont, Oklahoma, a citizen of the State of Oklahoma; A. J. Waldoek, of Atoka, Oklahoma, a citizen of the State of Oklahoma; J. T. Briscoe, of Marlow, Oklahoma, a citizen of the State of Oklahoma; Tilford T. Johnson, of Minco, Oklahoma, a citizen of the State of Oklahoma; T. H. Washington, Bentley, Oklahoma, a citizen of the State of Oklahoma; W. B. Gill, of Hugo, Oklahoma, a citizen of the State of Oklahoma; Willard R. Bleakmore, of Ardmore, Oklahoma, a citizen of the State of Oklahoma; Thomas H. Gibson, of Mill Creek, Oklahoma, a citizen of the State of Oklahoma; Mat Wolf, of Davis, Oklahoma, a citizen of the State of Oklahoma; J. C. Paxon, of Duncan, Oklahoma, a citizen of the State of Oklahoma; W. A. Edwards, of Ardmore, Oklahoma, a citizen of the State of Oklahoma; J. W. McClendon, of Atoka, Oklahoma, a citizen of the State of Oklahoma; N. B. Tisdall, of Stringtown, Oklahoma, a citizen of the State of Oklahoma; H. West, of Ada, Oklahoma, a citizen of the State of Oklahoma; F. E. McPherron, of Caddo, Oklahoma, a citizen of the State of 8 Oklahoma; and thereupon your orator complains and says:

First.

Your orator shows that, pursuant to the terms of the treaties entered into between your orator and the Choctaw tribe of Indians, and the members thereof, your orator granted, by patent duly executed and delivered to the said Choctaw tribe of Indians, certain lands located in the Indian Territory, now the Eastern District of Oklahoma, and that by the terms of said treaties and of the laws of the United States, your orator solemnly obligated itself to secure and protect the said Choctaw tribe of Indians and the members thereof, in the possession, use and enjoyment of, and the title to the lands so granted to them as aforesaid, and that, according to the terms of said treaties and of said Acts of Congress relating thereto, and of the patent to said lands, the said Choctaw tribe and every member thereof have at all times been, and now are, without power to dispose of any part of said lands or of any interest therein without the consent and authority of your orator, or otherwise than in the manner prescribed by your orator. The lands hereinafter in paragraph six, described, are a part of the lands aforesaid.

Second.

Your orator further shows that the sovereign, the Government of the United States, by reason of the helpless and dependent character of the Indian Tribes and Nations, and of the several members thereof within its borders, especially the Choctaw tribe of Indians and the several members thereof, is the guardian, and has exclusive dominion over and control of the property of said tribe of Indians and of the several members thereof, especially the said Choctaw tribe of Indians and the several members thereof, by virtue of which there is imposed upon your orator the duty to do whatever may be necessary for their guidance, welfare and protection; that the said

9 Choctaw tribe of Indians has always been, and is now, recognized, treated and dealt with as a tribe of Indians by the Government of the United States and the several branches thereof; that said tribe of Indians is now under the care of an Indian Agent, duly appointed under the laws of Congress of the United States; that the Congress of the United States still appropriates large sums of money for the benefit and protection of the said tribe of Choctaw Indians and of the individual members thereof, and for the maintenance of schools for the education of the members of the said tribe; that the Government of the United States, under and by virtue of the laws of Congress of the United States, still has a large sum of money in its possession belonging to the said tribe of Indians, and that there still remains unallotted a large area tribal lands the common property of the said tribe.

Third.

Your orator further shows that in the exercise of its powers so to regulate, control, and govern the affairs of the said Choctaw tribe of Indians and the members thereof, having in view the welfare of the said Indians and the carrying out of its treaty obligations, the Congress of the United States, by an Act approved July 1, 1902, the same being found in 32 Statutes at Large, page 641, provided that the land belonging to the said Choctaw tribe of Indians in the present State of Oklahoma should be allotted in severalty among the members thereof, but deeming the said Indians to be untutored and improvident and still requiring the protection and supervision of the General Government, it was provided by the said Act of July 1, 1902, that the portion of the lands so allotted to the members of the said tribe as homesteads should be inalienable, and further, that the lands other than homesteads allotted to the members of the said tribe should be alienable only in five years after the issuance of patent to the allottee, and not before such time, and that, in accordance with the provisions thereof, the said Act of Congress was duly accepted and ratified by the Choctaw people on September 25, 1902.

10 Fourth.

Your orator further shows that all of the tracts of land hereinafter described are situated in the Eastern District of Oklahoma,

and was land of the Choctaw tribe; and was, at the time of the execution and recording of the deeds and other instruments of writing set forth in paragraph number six hereof, allotted lands of the Choctaw tribe, which had been inherited by full blood Indians of said tribe, namely: the persons mentioned in paragraph six as granting or transferring the same; that the law at the time in force forbade the conveyance of lands of such full blood heirs without the approval of the Secretary of the Interior; that such approval was never, and has never been, obtained to the transactions set forth in said paragraph six; that the laws relating to the restrictions upon the sales of lands of the Five Civilized Tribes are public laws, and put the defendants upon inquiry and notice of all the matters set forth in this paragraph; that defendants were advised by the appearance of their grantors that they were such full blood Indians, or put upon inquiry so as to be chargeable with notice of the fact; and moreover, the matters set forth in this paragraph are notorious and of common knowledge.

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Fifth.

Your orator further shows, that each of the deeds, mortgages, leases, contracts of sale, powers of attorney, and other evidences of title to or incumbrance upon tracts of land as hereinafter set forth, was secured by defendants in defiant, wilful and open violation of law, for the purpose of unlawfully incumbering the lands described in paragraph numbered four above.

And your orator further shows that by filing for record and causing to be recorded the said deeds and other instruments of writing, each of the defendants herein named has unlawfully obtained for himself an apparent title or interest of record to the land hereinbefore described, all of which was done in defiance of said agency supervision and in open violation and contempt of the laws of the United States, to the great detriment, irreparable injury and loss of said Indians, and in direct interference with the supervision and control of the Government of the United States in that behalf.

Sixth.

And your orator further shows that among said transactions were those hereinafter under this sixth heading set forth. In such setting forth some abbreviations are employed for convenience, among others, the usual land office short descriptions by part sections, the letters N, W, S, E, signifying north, south, east and west, and the figures 2 and 4, signifying half and quarter sections, all the lands being sections of townships determined by the Indian Meridian of longitude, the word surplus is used to signify allotment exclusive of homestead; one half or other fraction blood signifies that the person has such a proportion of Indian blood of the tribe in which he is enrolled; the recording in books numbered 1, 2, 3, *ect.*, or lettered, signifies recording in books of the recording district of Indian Territory when the date of recording given prior to November 16, 1907, and to books of the Register of Deeds of the— County of the State of Okla-

12-16 homa, when the date given is subsequent; the record of restriction division gives petitions for removal of restrictions and the action taken, or the fact that no action was taken.

* * * * *

17-24 List No. 2.

Carter County.

Deed.

Hettie Ishtiahomabbe the daughter and sole heir of Lena John, deceased, a Choctaw to W. B. Janson, Chicago, Illinois.

Description: S. E./4 of S. W./4 of Section 18, and S. W./4 of N. E./4 of S. W./4 of Section 16, and S/2 of S. E./4 and N/2 of S. E./4 and S. W./4 of N. E./4 and S/2 of S. E./4 of N. E./4 of Section 21, Township 3 South, and Range 2 West, 270 acres, and all other lands rights, claims, etc.

Consideration \$1400.00.

Executed December 15, 1905.

Hettie Ishtiahomabbe.

Mary Nakishe.

Acknowledged December 15, 1903.

Recorded December 19, 1903, Book 18, page 262.

NOTE.—S. W./4 of N. E./4 and S/2 of S. E./4 of N. E./4 and W/2 of S. E./4 of Section 21, Township 3 South, Range 2 West, allotted as homestead and balance allotted exclusive of homestead to Lena John, deceased, fullblood, Choctaw by blood, Roll No. 3376.

Homestead certificate Nos. 7065 and 7121 issued December 11, 1903.

Certificate of allotment No. 6901 issued December 11, 1903.

Grantor is daughter of deceased, and is full blood.

* * * * *

25 List No. 2.

Atoka County.

Warranty Deed.

Susan Bond and Eliza Lewis, sole heirs of Simeon Thompson, deceased, of Oklahoma, to J. S. and L. V. Mullen, Ardmore, Oklahoma.

Description: S. E. 4 of S. W. 4 of S. E. 4 of Section 12, S. E. 4 of S. E. 4 of S. E. 4 of Section 12, Township 4 south, Range 4 west; N. 2 of S. W. 4 of S. W. 4 of Section 7; S. E. 4 of S. W. 4 of S. W. 4 of Section 7; S. W. 4 of S. E. 4 of S. W. 4 of Section 7; E. 2 of W. 2 of N. W. 4 of Section 18, S. W. 4 of S. E. 4 of N. W. 4 Section 18, Township 4 South, Range 3 West in Chickasaw Nation, and N. E. 4 of S. W. 4 of Section 10; N. 2 of S. E. 4 of S. W. 4 of Section 10; W. 2 of N. W. 4 of S. E. 4 of Section 10; N. W. 4 of S. W. 4 of S. E. 4 of Section 10, Township 2 South, Range 9 East, 190 acres.

Consideration \$550.00.

Executed March 2 and 6, 1905.

Acknowledged March 1, 1905.

Recorded February 9, 1906, in

Book 8 of Conveyances, page- 590 and 591.

NOTE.—S. E. 4 of S. W. 4 of S. E. 4; S. E. 4 of S. E. 4 of S. E. 4 of Section 12, Township 4 South, Range 4 West is allotted to Mary Cooper (age 10, full, Choctaw by blood Roll No. 4264) as homestead.

Certificate of homestead No. 8078, issued May 7, 1904.

Patent to homestead recorded October 22, 1906.

N. 2 of S. W. 4 of S. W. 4 Lot 4, S. E. 4 of S. W. 4 S. W. Lot 4 S. W. 4 of S. E. 4 of S. W. 4 of Section 7; E 2 of W. 2 of N. W. 4 and S. W. 4 of S. E. 4 of N. W. 4 of Section 18, Township 4 South Range 3 west, is allotted to Simon Thompson, deceased, (Full Choctaw by blood, Roll No. 4275) as surplus.

Certificate of allotment No. 10033, issued May 7, 1904.

Patent to allotment recorded December 16, 1905.

26-74 Susan Bond, No. 2.

NOTE.—N. E. 4 of S. W. 4; N. 2 of S. E. 4 of S. W. 4 W. 2 of N. W. 4 of S. E. 4; N. W. 4 of S. W. 4 of S. E. 4 of Section 10, Township 2 South, Range 9 East is allotted to Simon Thompson, Deceased, (full Choctaw by blood, Roll No. 4275) a homestead.

Certificate of homestead No. 2219, issued July 24, 1903.

Patent to homestead recorded September 26, 1905 .

The deceased has surviving full blood heirs.

75-98

List No. 2.

Carter County.

Quit Claim Deed.

Culberson Thompson as husband of Lucy Thompson, deceased, to J. S. and L. V. Mullen, Ardmore, Oklahoma.

Description: N. E. 4 and N. E. 4 of S. E. 4 and E. 2 of N. W. 4 of S. E. 4 and E. 2 of S. W. 4 of S. E. 4 of Section 1, Township 5 South, Range 1 West, and S. W. 4 of S. W. 4 of S. W. 4 of Section 31 Township 4 South, Range 1 East, and W. 2 of N. W. 4 of S. W. 4 of Section 6, Township 5 South, Range 1 East, and S. 2 of S. E. 4 of S. E. 4 and S. E. 4 of S. W. 4 of S. E. 4 Section 36, Township 4 South Range 1 West, 300 acres.

Consideration \$275.00.

Executed March 29, 1906.

Acknowledged March 29, 1906.

Recorded March 31, 1906, book 32, page- 30 & 31.

N. E. 4 of Section 1, Township 5 South, Range 1 west, is homestead balance of land described is allotted as surplus of Lucy Thompson, deceased (full blood, Choctaw Roll No. 723).

Homestead certificate No. 4801 issued October 30, 1903.

Patent recorded January 28, 1907.

Certificate of allotment No. 5453 issued October 30, 1903.

Patent recorded January 30, 1907.

NOTE.—Lucy Thompson has full blood heirs.

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99-127

List No. 2.

Grady County.

Warranty Deed.

Achafulubbee Ward, Sealy Ward and Morris Ward, to Joseph S. Mullen and Lestive V. Mullin, Ardmore, Oklahoma.

Description: N. W. 4 of N. W. 4 of N. E. 4 and S. E. 4 of N. W. 4 of N. E. 4 and E. 2 of S. W. 4 of N. E. 4 and S. W. 4 of S. E. 4 of N. E. 4 of Section 16, Township 3 South, and Range 2 West, also W. 2 of N. E. 4 and E. 2 of N. W. 4 of S. E. 4 of Section 23, Township 1 North and Range 6 West, also N. W. 4 of N. W. 4 and N. W. 4 of N. E. 4 of N. W. 4 of Section 5, Township 1 North, and Range 7 West, 200 acres, allotment of Minnie Ward, deceased.

Consideration \$1200.00.

Executed February 9, 1095.

Acknowledged February 9, 1905.

Recorded February 15, 1905, book 12, page 157.

NOTE.—N. W. 4 of N. W. 4 of N. E. 4 of Section 16, Township 3 South, and Range 2 West, and W. 2 of N. E. 4 and N. E. 4 of N. W. 4 of S. E. 4 of Section 23, Township 1 North, and Range 6 West allotted as homestead and balance allotted exclusive of homestead to Minnie Ward, deceased (full blood, Choctaw by blood, Roll No. 5842).

Homestead certificates Nos. 10480 and 10481 issued February 2, 1905.

Certificates of allotment Nos. 14400 and 14401 issued February 2, 1905.

Certificate of allotment No. 14445 issued February 4, 1905.

Patents to allotment and homestead not recorded.

Minnie Ward has full blood heirs.

* * * * *

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Seventh.

Your orator further shows that it is informed, and verily believes, and therefore charges the fact to be, that the defendants herein named, and each of them, has heretofore unlawfully secured from the members of the said Choctaw tribe of Indians other unlawful deeds, conveyances, mortgages, powers of attorney and contracts for and about their said allotments, which the said Indians and freedmen had no authority to sell, alienate, dispose of, contract about or incumber in any manner, as aforesaid, but that for the reason that such deeds, conveyances, mortgages, powers of attorney and contracts

for and about their said allotment have not been recorded by the said defendants, your orator is unable to give a minute and correct description of the same without the discovery from the defendants hereinafter in this bill prayed; and that the said defendants herein named are continuing to induce the members of the said Choctaw tribe of Indians named in this bill, and other members of the said tribe, to make, execute and deliver to them, the said defendants, and to take and accept from the said Choctaws, deeds, conveyances, mortgages, powers of attorney and contracts for and about their allotments, and threaten, announce, publish and declare that they will continue such unlawful acts and doings. And your orator is informed, and believes, and so avers, that said documents and, in many cases, possession of the lands are being, and are about to be obtained by said defendants for wholly improper purposes and in fraud of said Choctaws. And your orator further shows and avers that the defendants will so continue their unlawful acts and doings; that their conduct as specifically alleged in paragraphs five and six hereof has, and their present and future conduct, as in this paragraph alleged, will, if continued, greatly harass your orator in the discharge of its duty to, and in the administration of its policy in relation to said Indians, and compel it to bring many suits in order to annul and set aside the said deeds, conveyances, mortgages, powers of attorney, leases and contracts for and about the said lands,

129 which the defendants have taken, are taking, and will continue to take, as herein alleged, and said defendants have been, and are taking possession of many of said tracts, as your orator is informed and believes, but your orator cannot, within the limited time deemed best for the filing of this bill, ascertain clearly and set forth the facts with regard to the possession of particular tracts.

Eighth.

And your orator further shows that, in addition to the instruments of writing heretofore mentioned and specified, upward of four thousand other instruments of writing, of a nature similar to those heretofore set forth, purporting to convey or incumber or to affect the title of lands located within the Eastern Judicial District of Oklahoma and duly allotted to members of the Five Civilized Tribes or belonging to said tribes, have been executed and placed on record by the defendants herein and other persons and corporations in contravention of the treaties entered into between your orator and the said several Indian tribes and the laws of the United States, and your orator shows that unless it shall be permitted to join in its bills numerous defendants, against each of whom your orator has a like cause of action, and against each of whom your orator seeks the same relief, and whose pretended claims are based upon similar facts and involve precisely the same questions of law, your orator will be driven to the necessity of bringing a great number of distinct and separate suits, and that it will be practically impossible for your orator to prosecute, and for the courts to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time.

Ninth.

Your orator further shows that under and by reason of the afore-said treaties and Acts of Congress, all of the deeds and other instruments of writing hereinafter mentioned constitute a damage to the titles of the said members of the said tribes, thereby greatly
 130 deteriorating the value of the interests of the said tribes and members thereof in their lands, and that defendants are interfering with the possession and rights of the said tribes and members thereof to their said lands and are seriously retarding the control and supervision of the Government over them, and are producing irreparable injury to your orator and the said tribes and member- thereof. And your orator further shows that, by reason of the duties, obligations, and rights of the Government as set forth in this bill, the Government is charged with the duty of protecting in the courts the rights of the said tribes and members thereof and — that behalf is charged with a trust of a high and delicate character, and that, in the performance of these obligations and trust duties it is necessary to seek the relief of this court to the end that the defendants herein named should not only be ousted from the possession of the said lands, but that the court should order the said several deeds and instruments of writing herein specified and described to be delivered up and surrendered for cancellation and the record purged of the same; that the court should order the defendants to discover all facts relating to their possession of said lands and to set forth all deed, conveyances, mortgages, powers of attorney, and contracts in their possession other than those particularly mentioned and described in this bill, in order that the same may be cancelled and that the defendants should be enjoined from taking any additional deed, conveyances, mortgages, powers of attorney, and contracts from the freedmen and Indians named in this bill or from any other freedmen or Indians of the said Choctaw Tribe in contravention of the acts of Congress.

Tenth.

Your orator further shows that it has joined in this bill of complaint numerous defendants for the purpose of avoiding a multiplicity of suits to recover the possession of the said lands for the benefit of the said allottees and for the purpose of avoiding a multiplicity of suits to enjoin each of the several defendants herein
 131 from continuing to occupy the said lands and from taking any further deeds or other instruments of writing purporting to convey the title of the said allottees and a multiplicity of suits to have the deeds and instruments of writing which they
 132 have induced the said allottees to make ordered surrendered and delivered up for cancellation and the record purged thereof; that the interest of your orator as guardian and trustee for the Indians and as parens patriæ, is identical in all cases, and that the right of your orator for relief against said several defendants is identically the same as against each and the remedy against the said defendants hereinafter prayed for is precisely the same against each.

Forasmuch, therefore, as your orator is remediless in the premises

at and — the strict rule of the common law and is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable, and to the end that your orator may have that relief which it can only obtain in a court of equity and that each of the defendants herein named may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, your orator prays:

First. That this honorable court by its decree shall adjudge and declare the said several leases, deeds, instruments of conveyance and incumbrances, described and set forth in this bill to be void and of no effect as instruments of conveyance and that the same be cancelled and annulled and altogether held for naught and that the title to the lands therein described be held and decreed to be in the allottees thereof, subject to the terms, conditions and limitations contained in the treaties, agreements, and laws of the United States.

Second. That the defendants herein in this bill named shall be required to make a full and true discovery and disclosure of all possessions, claims to possession, deeds, conveyances, mortgages, powers of attorney, contracts, and other instruments of writing in the possession or control of said defendants, or which may have been made, providing for the sale and incumbrance of or in any manner contracting for or charging or binding or attempting so to contract for,

133 charge, or bind the lands allotted to any of the Choctaw tribe of Indians, setting forth a list or schedule showing as to such deeds, conveyances, mortgages, powers of attorney, contracts, and other instruments of writing the full name of all the parties thereto, the dates thereof, and a correct description of the land therein attempted to be conveyed, mortgaged or contracted about, and that each of the said defendants shall be required to surrender and deliver up to this honorable court all such deeds, conveyances, mortgages, powers of attorney, contracts, and other instruments of writing so discovered and disclosed by them, and that this honorable court shall, by its decree declare the same to be void and of no effect, and that the same shall be cancelled and annulled and altogether held for naught and the title to the lands therein mentioned and described be held and decreed to be in the tribe or members thereof to whom they were allotted under the provisions of the said Act of July 1, 1902, or any other Act, subject to the treaties, agreements, and laws of the United States; that all rights of and to possession shall be declared to be in said Indians, and that all defendants in possession or claiming possession be ordered to vacate or cease making such claims, and that your orator may have such other and further relief in the premises as the nature and circumstances of this case may require as may — agreeable to equity and good conscience.

Third. That subpoenas, and all proper process issue, making each and every one of the following named persons parties to said bill, and requiring each of them to appear upon a certain day, to be fixed by this honorable court and answer fully the exigencies of this bill, but not under oath, which is hereby expressly waived.

134 Charles E. McPherrren; Howard West; Ida B. Bentley; Alvin F. Pyeatt; Albert Rennie; W. B. Janson; D. G. Flanniken; Joseph M. Bettes; J. B. Mills; Fort Towson Land & L. Co.; W. S. Farmer; W. G. Flenniken; A. E. Perry; J. S. Mullen; L. V. Mullen; F. R. Hedricks; Jas. Ables; A. G. Ethridge; I. L. Cook; W. R. Jeffrey; E. E. Davis; D. C. McCalib; John J. Cravens; James Alexander; Eliza Alexander; C. H. Colbert; Hugh Simpson; C. J. Ralston; W. R. Ritchie; R. R. Hall; M. L. Franklin; L. C. Hoher; J. W. Humphrey; E. A. Newman; W. W. Morris; J. T. Petty; W. C. Hull; H. M. Dunlap; David F. Le Master; D. W. Humphreys; W. Chenault; V. Bronaugh; G. D. Duncan; Chas. S. Lynch; E. E. Wilkins; N. C. Hocker; William L. Reed; G. D. Hodges; L. Fountain; A. J. Waldoek; E. O. Butler; J. C. Terrell; P. O. Stover; Albert Rennie; Wm. H. Payne; J. T. Hill; C. T. Erwin; J. Edgar White; F. M. Fox; Mike Meyer; American Investment Co.; W. H. Walker; G. J. Humphreys; Nelson H. McCoy; Thos. J. Sanford; J. H. Jackson; Ed Stewart; B. C. Harbert; John Casteel; Perry G. Lanham; E. L. Webb; James W. Dean; A. Weaver; T. M. Dumas; F. E. Riddle; E. G. Owens; G. G. Murray; Nellie Johnson; U. S. Joins; H. S. Gilbert; H. B. Low; W. J. Gilbert; William L. Sawyers; S. E. Hill; C. B. Hill; Walter P. Hopkins; Eric C. Watkins; J. T. Briscoe; E. C. Watkins; Tilford T. Johnson; T. M. Washington; W. B. Gill; Willard R. Bleakmore; Thomas R. Gibson; Mat Wolf; J. C. Paxon; W. A. Edwards; J. W. McClendon; N. B. Tisdall; H. West; F. E. McPherrren;

135 CHARLES J. BONAPARTE,
Attorney General,
 By CHARLES W. RUSSELL,
Ass't Att'y Gen'l.
 WM. J. GREGG,
United States Attorney,
 By HARLOW A. LEEKLEY,
Assistant U. S. Attorney.
 CHARLES W. RUSSELL,
United States Assistant Attorney-General,
of Counsel.

136 UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

On this 15th day of July, 1908, personally appeared before me, L. G. Disney, Clerk of the Circuit Court of the United States within and for said District, Harlow A. Leekley, who, being first duly sworn, deposes and says that he is an Assistant United States Attorney for the Eastern District of Oklahoma; that he has read the foregoing bill, by him subscribed, and knows the contents thereof, and that the matters therein stated upon knowledge he knows to be true, and those upon belief he believes to be true.

HARLOW A. LEEKLEY.

Subscribed and sworn to before me this the 15th day of July, 1908.

[SEAL.]

L. G. DISNEY, *Clerk.*

137-141 Endorsed as follows: No. 307. In the United States Circuit Court for the Eastern District of Oklahoma. The United States v. Charles E. McPherrren. Bill of Complaint. Filed July 17, 1908. L. G. Disney, Clerk U. S. Circuit Court. Wm. J. Gregg, U. S. Attorney, Charles W. Russell, of Counsel.

* * * * *

Demurrer.

142 Come now defendants, J. S. Mullen, L. V. Mullen, J. T. Hill, Fort Towson Land and Lumber Co., J. H. Jackson, Ed. Stewart, John T. Petty, A. G. Etheredge, J. C. Paxson, Mike Mayer, G. J. Humphreys, H. M. Dunlap, J. B. Mills, W. B. Gill, F. M. Fox, H. West, W. C. Hull, D. G. Flanniken, W. G. Jansen, Perry G. Lanahan, John Casteel, B. C. Harber, W. H. Payne, P. O. Stover, W. H. Walker & W. L. Reed, in above styled cause, by protestation not confessing or acknowledging any or all of the matters and things in the said complainant's Bill to be true in such manner and form as the same are therein set out and alleged, for cause says:

First. That this Court has no jurisdiction of this cause.

Second. That said Bill fails to show such interest in the complainant as would entitle it to maintain this suit.

Third. That complainant has no capacity to maintain this suit.

Fourth. That said Bill is wholly devoid of equity.

Fifth. That by said Bill it is sought to quiet title to land as to which the complainant is not now and has never been in possession.

Sixth. That there is a defect of parties to the Bill, in this, that each grantor named in said Bill are the real parties in interest and have not been made parties.

Seventh. That there is a misjoinder of alleged causes of action, in this, that the alleged causes of action against these defendants are improperly joined with that of numerous other defendants hereto, when there is no joint interest as between these defendants, nor any joint occupation of the property, nor any other reason that would authorize the joint suit.

Eighth. That said Bill is multifarious.

Ninth. That said Bill does not disclose such a state of facts as would entitle complainant to recover in any event.

Wherefore, and for other divers good causes to demur appearing in said bill, these defendants demur thereto and humbly demand the judgment of this Court whether they shall be compelled to make answer to said Bill or any part thereof.

C. B. STEWART,
S. T. BLEDSOE,
W. A. LEDBETTER &
JAS. E. HUMPHREY,
Counsel for Defendants.

43 STATE OF OKLAHOMA,
County of Carter:

J. S. Mullen, one of defendants herein, for himself and for each of his co-defendants, upon oath states that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

J. S. MULLEN.

Subscribed and sworn to before me this 28 day of September, A. D. 1908. My Commission exp- Apr. 1, 1912.

[SEAL.]

RICHARD M. LESTER,
Notary Public.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

JAS. E. HUMPHREY,
Of Counsel for Defendants.

No. 307. Equity.

THE UNITED STATES OF AMERICA
vs.

CHAS. E. McPHERREN et al.

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C. B. STEWART,
W. A. LEDBETTER,
S. T. BLEDSOE, AND
JAMES E. HUMPHREY,
Counsel for Defendants.

Filed Oct. 5, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern District, Okla.

Endorsed as follows: No. 307. United States of America, vs. Chas. E. McPherrren, et al. Demurrer of P. O. Stover, et al. Filed Oct. 5, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla. C. B. Stewart, W. A. Ledbetter, S. T. Bledsoe, and James E. Humphrey, Counsel for Defendants.

* * * * *

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No. 9.

In the Circuit Court of the United States for the Eastern District of Oklahoma.

No. 307.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. MACFERREN, W. B. JANSEN, et al., Defendants.

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Demurrer of W. B. Jansen.

W. B. Jansen, one of the defendants in the above styled cause, by protestation [-ot] confessing or acknowledging any or all of the matters and things in the said plaintiff's Bill to be true in such manner and form as the same are therein set out and alleged, and for cause says that said Bill fails to show such interest in the plaintiff as would entitle it to maintain this suit.

Second. Because the plaintiff has no capacity to maintain the suit;

Third. Because said Bill is wholly devoid of equity.

Fourth. Because by said Bill it is sought to quiet title to land as to which the plaintiff is not now and has never been in possession.

Fifth. Because there is a defect of parties to this suit.

Sixth. Because there is a misjoinder of alleged causes of action in this, that the alleged cause of action against this defendant is improperly joined with that of numerous other defendants hereto, when there is no joint interest as between these defendants nor any joint occupation of the property, nor any other reason that would authorize the joint suit.

Seventh. Because said Bill is multifarious.

Eighth. Because complainant does not disclose such a state of facts as would entitle plaintiff to recover in any event.

Wherefore and for other divers good causes to demur appearing in said Bill, this defendant demurs thereto and humbly demands the judgment of this Court whether he shall be compelled to make answer to said Bill or any part thereof.

COTTINGHAM & BLEDSOE.

Of Counsel for Defendant.

STATE OF ILLINOIS,
County of Cook:

W. B. Jansen makes solemn oath that he is the defendant above named and that the foregoing demurrer is not interposing for delay and that the same is true in point of fact.

W. B. JANSEN.

Subscribed and sworn to before me this 24th day of August A. D. 1908.

[SEAL.]

NELSON W. WILLARD,
Notary Public.

My commission expires Oct. 9th, 1910.

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Certificate of Counsel.

I hereby certify in my opinion, the foregoing demurrer is well founded in point of law.

S. R. BLEDSOE,
Of Counsel for Defendant.

In the Circuit Court of the United States for the Eastern District of Oklahoma.

No. 307.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.

CHARLES E. MACFERREN et al. and JOSEPH M. BETTES, Defendants.

Demurrer of Joseph M. Better same as demurrer filed for W. B. Jansen in this bill.

Endorsed as follows: No. 307. The United States of America, vs. W. B. Jansen, Joseph M. Bettes et al. Demurrers of W. B. Jansen and Joseph M. Bettes. Filed Aug. 31, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist., Okla. Cottingham & Bledsoe, Solicitors for W. B. Janson & Joseph M. Bettes.

* * * * *

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(c.)

Opinion.

And thereafter, on the sixth day of August, 1909, it being a day of the regular McAlester term, at the Court House at Muskogee, after Court being opened in due form as of the McAlester sitting, present and presiding Honorable Ralph E. Campbell, Judge, the following opinion was read:

THE UNITED STATES OF AMERICA, Complainant,
vs.

JAMES P. ALLEN et al., Respondents,

And Similar Cases.

Opinion.

The United States as complainants have filed in this court numerous bills, in each of which many individuals are made defendants. Each bill has relation to lands of one of the five Civilized Tribes. In the first paragraph of each bill, it is alleged that pursuant to the terms of certain treaties entered into between the United States and the tribe referred to, the United States granted by patent to each tribe certain lands in the Indian Territory, now the Eastern District of Oklahoma, and that by the terms of said treaties and the laws of the United States, the United States solemnly obligated themselves to secure and protect such tribe of Indians and the members thereof in the possession, use and enjoyment of and the title to said lands, and that, according to the terms of said treaties and of said acts of Congress relating thereto, and of the patent to said lands, the said tribe of Indians and every member thereof, have at all times and are now without power to dispose of any part of said lands or of any interest therein without the consent and authority of the United States or otherwise than in the manner prescribed by the United States.

It is alleged that by reason of the helpless and dependent character of such Indians tribe and the several members thereof, the United States as the guardian have exclusive dominion over and control of the property of said tribe and the several members thereof by virtue of which there is imposed upon the United States the duty to do whatever necessary for the guidance, welfare and protection of such Indians; that said tribe has always been and is now recognized, treated, and dealt with as a tribe of Indians by the United States, under the care of an Indian Agent; that Congress still appropriates large sums of money for the benefit and protection of said tribe and the individual members thereof, and for school purposes; that the United States still have in their possession a large sum of money belonging to said tribe, and that there still remains unallotted a large body of land, the common property of such tribe.

Reference is then made to the act or acts of Congress under which the lands of such tribe have been allotted to the individual members thereof, subject to the various restrictions against the alienation thereby imposed. Paragraph IV of the bill then
185 sets forth the character of the land involved at the date of the conveyance sought to be cancelled, as to whether allotted or tribal. For convenience, the bills may be classified as follows:

Cherokee Nation.

No. 1. All cases of conveyance by allottees to defendants where restrictions will be removed July 27, 1908.

No. 2. All cases of land not allotted at the time of conveyance complained of, but sold by a person claiming a right to be enrolled, and later denied citizenship.

No. 3. Sales, without the approval of the Secretary, of lands inherited by full blood heirs. Before April 26, 1906.

No. 4. Same as above, after April 26, 1906.

No. 5. Homestead of freedmen.

No. 6. Conveyance by other than allottee covering land allotted at date of conveyance.

No. 7. Conveyance by other than allottee covering lands which were tribal at date of conveyance.

No. 8. Homesteads of Intermarried Whites.

No. 9. Mixed bloods. Homesteads of $\frac{1}{2}$ bloods and more, and surplus of $\frac{3}{4}$ blood and more.

No. 10. Full bloods, prior to April 26, 1906.

No. 11. Full bloods, after April 26, 1906.

In the Creek Nation the bills may be classified the same as above, except that there is no bill No. 8. In the Choctaw and Chickasaw Nations the bills may be classified as above. In addition, there is, as to these nations, a bill covering Choctaw and Chickasaw lands sold prior to the removal of restrictions under the Act of July 1, 1908. As to the Seminole Nation, the bills may be classified as follows:

Conveyances by freedmen after allotment and before issuance of patent;

Conveyances by full blood heirs; before issuance of patent.

Conveyances by mixed bloods before the issuance of patent.

Conveyances by other than allottees.

Conveyances by adopted citizens before issuance of patent.

Conveyance by full bloods.

186 It is to be noted that all the bills involve lands which had been allotted at the time of the conveyance complained of, except Nos. 2 and 7. None of the bills applying to the Seminole Nation involve unallotted lands. In class No. 2 it is alleged that the tracts of land involved comprise lands of the tribe which had never been allotted at the time of the execution and delivery and recording of the conveyances sought to be cancelled, but were then tribal lands, and that no individual, at that time, nor ever has had any separate ownership thereof, or right to transfer or incumber the same. In class No. 7 it is alleged that, at the date of the conveyance sought to be cancelled, the lands were tribal lands, but it is not alleged that they are still tribal and unallotted. Paragraph 5 of the bill then proceeds substantially as follows:

"Your orator further shows that each of the deeds, mortgages, leases, contracts of sale, powers of attorney and other evidence of title or incumbrance upon tracts of land as hereinafter set forth, was secured by defendants in defiant, wilful, and open violation of law, and the duty which rested upon this nation and every member thereof, and for the purpose of unlawfully incumbering said lands

allotted to members of the said Seminole tribe of Indians, all of whom, under the treaties and laws of the United States, were without power or authority to sell, alienate, or incumber said lands in any manner whatsoever, and your orator further shows that by filing for record and causing to be recorded the said deeds and other instruments of writing, each of the defendants herein named has unlawfully obtained for himself an apparent title or interest of record to the land hereinbefore described, all of which was done in defiance of said agency supervision and in open violation and contempt of the laws of the United States, to the great detriment, irreparable injury and loss of said Indians, and in direct interference with the supervision and control, policy and duty of the Government of the United States in that [*behalld*], and in obstruction of the execution of the laws."

Paragraph 6 then sets forth in detail the various conveyances sought to be cancelled, involving numerous separate and distinct tracts of land in each of which conveyances, in most instances, the individual allottee or those claiming through him, appear as grantors, and one or more of the defendants appear as grantees.

Paragraph 7 alleges upon information and belief that the defendants have secured, or are proceeding to secure, other unlawful conveyances not now recorded, a minute description of which

187 the pleader alleges cannot be given without the discovery prayed for, and that the defendants are continuing to induce the members of the tribe to execute and deliver to them such conveyances, etc., and in many instances are taking possession of the lands covered by such conveyances for wholly improper purposes, and in fraud of the said tribe. The bill then proceeds:

"And your orator further shows and avers that the defendants will so continue their unlawful acts and doings and that their conduct as specifically alleged in paragraphs 5 and 6 hereof, as all their present and future conduct, as in this paragraph alleged, will, if continued, greatly harass your orator in the discharge of its duty to and in the administration of its policy in relation to said Indians, and compel it to bring many suits in order to annul and set aside the said deeds, conveyances, mortgages, powers of attorney, leases, and contracts for and about the said lands, which the defendants have taken, are taking, and will continue to take as herein alleged."

The bill then proceeds specifically as follows:

Eighth.

"And your orator further shows that, in addition to the instrument of writing hereinbefore mentioned and specified, upward of four thousand other instruments of writing, of a nature similar to those hereinbefore set forth, purporting to convey or to encumber or to affect the title of lands located within the Eastern Judicial District of Oklahoma, and only allotted to members of the Five Civilized Tribes, or belonging to said tribes, have been executed and placed on record by the defendants herein and other persons and corporations, in contravention of the treaties entered into between your orator and the said several Indian tribes and the laws of the United States,

and your orator shows that unless it shall be permitted to join in its bill of numerous defendants, against each of whom your orator has a like cause of action, and against each of whom your orator seeks the same relief, and whose pretended claims are based upon similar facts and involve precisely the same questions of law, your orator will be driven to the necessity of bringing a great number of separate and distinct suits, and that it will be practically impossible for your orator to prosecute and for the court to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time."

Ninth.

"Your orator further shows that under and by virtue of the aforesaid treaties and acts of Congress, all of the deeds and other
188 instruments of writing hereinafter mentioned constitute a damage to the titles of the said members of the said tribes, thereby greatly deteriorating the value of the interests of the said tribes and members of said tribes in their lands, and that defendants are interfering with the possession and rights of the said tribes and members of the said tribes in their said lands, and are seriously retarding the control and supervision of the Government over them, and are producing irreparable injury to your orator and the said tribes and members of said tribes. And your orator further shows that by reason of the duties, obligations, and rights of the Government, as set forth in this bill, the Government is charged with the duty of protecting in the courts the rights of the said tribes and members thereof, and in that behalf is charged with a trust of a high and delicate character, and that in the performance of these obligations and trust duties it is necessary to seek the aid of this court to the end that the defendants herein named should not only be ousted from the possession of the said lands, but that the court should order the said several deeds and instruments of writing herein specified and described to be surrendered and delivered up for cancellation, and the record purged of the same; that the court should order the defendants to discover all facts relating to their possession of said lands, and to set forth all deeds, conveyances, mortgages, powers of attorney, and contracts in their possession, other than those particularly mentioned and described in this bill, in order that the same may be cancelled.

Tenth.

"Your orator further shows that it has joined in this bill of complaint numerous defendants for the purpose of avoiding a multiplicity of suits to recover the possession of the said lands for the benefit of the said tribes and members thereof, and for the purpose of avoiding a multiplicity of suits to enjoin each of the several defendants herein from continuing to occupy the said lands and from taking any further deeds or other instruments of writing purporting to convey the title to said lands, and a multiplicity of suits to have the deeds and instruments of writing which they have induced the said members to make, ordered surrendered and delivered up for cancellation and the record purged thereof; that the interest of your orator, as

guardian and trustee for the Indians and as *parens patriæ*, is identical in all cases, and that the right of your orator for relief against the said several defendants is identically the same as against each, and the remedy against each of the said defendants hereinafter prayed for is precisely the same as against each. For as much, therefore,

189 as your orator is remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable, and to the end that your orator may have that relief which it can only obtain in a court of equity, and that each of the defendants herein named may answer the premises, the benefit whereof is expressly waived by your orator, your orator prays: * * *

The prayer of each bill is, first, that the conveyances set forth in paragraph six shall be decreed to be void and of no effect as instruments of conveyance and shall be cancelled, and that the title to the lands therein described be held and decreed to be in the allottee or their heirs, subject to the terms, conditions, and limitations contained in the treaties, agreements, and laws of the United States. It is further prayed that the defendants shall be required to make discovery and disclosure of all other possessions, claims to possession, deeds, conveyances, mortgages, powers of attorney, contracts and other instruments of writing, setting forth a list or schedule thereof in their possession, conveying the lands allotted to any of the members of the said tribe, or unallotted lands of the said tribe; and that the defendants be required to surrender and deliver up to the court all such deeds, etc.; and that the same be cancelled, and such lands decreed to be in the tribe or members thereof to whom they have been allotted; and that all defendants in possession or claiming possession thereof be ordered to vacate or cease making such claim; and then follows the usual prayer for subpoena.

Many of the defendants filed demurrers to these bills, and a date was set by the court for hearing arguments thereon, and all such demurrers were presented at the same time, fully argued by counsel, and thereupon submitted to the court. The demurrers set up many grounds, the main ones of which are in substance as follows: That the court is without jurisdiction; that the bill of complaint fails to show any such interest in the plaintiff as would entitle it to maintain these suits; because the plaintiff has no capacity to maintain these suits; because the bill of complaint is wholly devoid of equity; because by said bill it is sought to quiet title to land of which the plaintiff is not now and has never been in possession; because there is a defect of parties to these suits; because there is a misjoinder of alleged causes of action in this: That the alleged cause of action against each defendant is improperly joined with that of numerous other defendants when there is no joint interest as between the defendants
190 or any joint occupation of the property or any reason that would authorize the joint suit alleged because the bills are multifarious; because the bills do not disclose such a state of facts as entitle plaintiff to recover in any event.

While a few of the bills filed relate to transactions alleged to have taken place prior to allotment of the lands involved, it appears that

such lands have since been allotted, and we have now to consider only lands of the Five Civilized Tribes allotted to citizens thereof.

The contention that the Court has no jurisdiction is unsound, if the United States are properly parties plaintiff, because wherever the United States appear as parties plaintiff or petitioners, the Circuit Court of the United States has jurisdiction. Constitution, Art. 3, Sec. 2, Clause 1. Act of Congress of '87-8, 25 Stat. at Large, 433.

The question of the capacity of the United States to sue involves the question as to whether they have such an interest in the controversy as will entitle them to maintain the suits, for unless they have such interest, either by way of title in the land, or duty or obligation in relation to the allottees and the lands involved, the demurrers on this point must be sustained. In *United States vs. San Jacinto Tin Co.*, 125 U. S. 273, a suit to annul and set aside a patent, the court says:

"But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of these other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States, and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if

there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

Has the government any interest, by way of ownership of or title to these allotted lands? They were originally granted by patent to the respective tribes, to be owned and held by them while their tribal relations should exist, or until they should abandon the same. The treaty with the Choctaws provided that the land should be granted to them "in fee simple to them and their descendants, to enure to them while they should exist as a nation and live on it." (Kappler, p. 311, 7 Stat. 333) This same title was vested in the Chickasaws, (Kappler 11 Stat. 573) By treaty with the Cherokees (7 Stat. 478), it was agreed that the lands ceded to them should be conveyed to them by patent, according to the provisions of the act of May 28, 1830, above referred to, and patent was issued accordingly. By treaty with the Creeks, it was provided that the lands assigned them should be granted by patent in fee simple, and that the right thereby granted should be continued to said tribe so long as they should exist as a nation and continue to occupy the same. (7 Stat. 417). By treaty of 1866 (14 Stat. 755), the United States granted and sold

to the Seminole Nation the major part of if not all of the land now allotted to them, for the sum of fifty cents per acre, a total sum of a hundred thousand dollars. This appears to have been an unconditional grant. The above land so granted to the several tribes was occupied by them in their tribal capacity until the allotment of these lands in severalty to the individual members, with the consent of the government, so that the tribal extinction or abandonment contemplated in the treaties is no longer to be considered. Since the utmost interest by way of title which it can possibly be contended remained in the government was the possibility of its reverting upon such tribal extinction or abandonment, it follows that no vestige of title to these lands now remains in the United States. These lands are now allotted lands for which allotment certificates have been issued, followed, in many instances, by patent, so that the equitable title at least has passed to the individual allottees. (*Wallace vs. Adam*, 143 Fed. 716).

Under the general allotment act, where the title passes direct from the government to the allottee, the issuance of patent passes title to the allottee in fee simple, and under no circumstances does it revert to the United States. *Schrimpscher vs. Stockton*, 183 U. S. 290.

There is less reason why it should revert here.

192 It follows that the complainant can claim no such interest by way of title to these lands as would entitle it to maintain these suits.

In the act of Congress approved May 27, 1908, relative to the removal of restrictions is found the following provision:

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same in cases where deeds, leases or contracts or any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act."

It is contended that this provision confers upon complainant authority to institute and maintain these suits in the name of the United States. The dominant purpose of this provision seems to be to preclude any such construction of the act as would deny the United States the right to bring such suits referred to, rather than to confer such right. The bill, as originally introduced, did not contain this provision. On February 10, 1908, at the same session, a bill was introduced by Mr. Sherman, in the House, and Senator Clapp, in the Senate, specifically conferring upon the Attorney General the right to bring such suits in the name of the United States, "for the use and benefit and on behalf of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes, or any enrolled member of either thereof". This bill covers over six pages, providing in detail for the conduct of such

suits, and also providing for the transfer from the state to the federal courts of such suits in which the United States may become a party, as provided in the bill. This bill did not become a law. After its introduction and while the committee on Indian Affairs was considering the act of May 27, 1908, the Assistant Attorney General, for the Interior Department, appeared before the committee (Report of Committee on Indian Affairs for March 20, 1908), stating that the Department was in favor of the bill under consideration, but calling attention to the jurisdictional bill above referred to, saying that "the Department believes that some provision for jurisdiction should be passed with the other bill, for these reasons, briefly, that if it is not necessary, it could do no damage." He then referred to a

193 number of cases arising in the state courts, wherein he deemed it advisable that provision be made for removal to the federal court. He said "the Department feels that if the restrictions bill should be passed separately that there would be no possible chance, perhaps, to enact this other bill, because the term is approaching its end, and it is very difficult to get legislation when there is any direct active opposition to it. That being the history of such efforts it is the feeling of the Department that the two should be passed together."

Then followed a lengthy discussion between the representatives of the Department and members of the committee, relative to incorporating such jurisdictional provisions. It was conceded that without such provision, the existence of the authority and jurisdiction was not without question, the Assistant Attorney General insisting, however, that it already existed. Three of the Oklahoma representatives on the committee opposed the incorporation of a measure granting additional jurisdiction, insisting that only such powers and jurisdiction as already existed by virtue of the enabling act and other legislation should be exercised by the federal government, and conceded that if they existed, their exercise was proper. Finally the paragraph now being considered was incorporated.

The jurisdiction bill which failed was one positively and specifically conferring the authority and jurisdiction as if they had not theretofore existed. This provision is negative in its terms, not purporting to confer the right, but disavowing any intention to deny the same. Therefore, it can hardly be said that these eleven lines were incorporated in this bill in lieu of the jurisdiction bill containing over six pages.

In view of this legislative history, it is my opinion that it was only intended by this paragraph to provide that if by existing legislation the United States had authority to institute and maintain such suits, it was not the desire nor the intention of Congress for this act to deny it, and it should not be so construed. It is urged that the appropriation of money for such suit is a legislative recognition of their validity. In my judgment, it cannot be so construed in this case. It is the expressed purpose of Congress not to deny the right if it existed. A refusal to provide money for the conduct of such suits would have prevented their institution and maintenance, resulting the same as a denial of the right. Hence the appropriation. The authority of the

complainant to maintain these suits, if it exists, must be found elsewhere.

194 In the recent opinion of this court, overruling the demurrers in the town lot cases, the history of these Indians was thus reviewed:

"In the early part of the last century the Creek, Cherokee, Chickasaw, Choctaw, and Seminole tribes of Indians, known as the Five Civilized Tribes, occupied in their tribal capacity various portions of the states east of the Mississippi River. The growth and development in these then new states had caused the conflict between the advancing civilization of the white man and the habits and customs of these tribes to become more marked. The Indians as a rule were not then sufficiently advanced toward the civilization of their white neighbors to adapt themselves to the new order of things, and to merge these tribes into the body politic of the state was found to be impracticable. It was therefore apparent to Congress that some disposition of these Indians must be made. The plan of giving them in exchange for their lands east of the Mississippi, portions of the public domain west of the Mississippi, where, as it then appeared, they would be undisturbed by the encroachment of white men for years to come, was finally devised, and on May 28, 1830, an act of Congress was passed (4th Stats. at Large 411) providing that the President might cause the country west of the Mississippi, not within any state or organized territory and to which the Indian title had been extinguished, to be divided up into districts for the reception of such tribes or nations of Indians who might choose to exchange lands then occupied by them for such districts and remove thereto. This act contained the following provisions:

'SEC. 3. And be it further enacted, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided, always, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same.'

Referring to the above act of Congress, it was said by Mr. Justice Davis, in the *Kansas Indians*, 5 Wallace 737,

"The well defined policy of the Government demanded the removal of the Indians from organized states, and it was supposed at the time the country selected for them was so remote as never to be needed for settlement, etc."

195 The Senate Committee, whose report is quoted in *Stevens vs. Cherokee Nation*, 174 U. S. 448, took occasion to say, with reference to the Five Civilized Tribes:

"This section of country was set apart to the Indian with the avowed purpose of maintaining an Indian community beyond and away from the influence of white people. We stipulated that they should have unrestricted self-government and full jurisdiction over persons and property within their respective limits, and that we

would protect them against intrusion of white people, and that we would not incorporate them in a political organization without their consent. Every treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of the Indians from the whites, and non-participation by the whites in their political and industrial affairs. We made it possible for the Indians of that section of country to maintain their tribal relations and their Indian polity, laws and civilization if they wished so to do. And, if now, the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a population of strangers five times in number to their own, it is not the fault of the Government of the United States, but comes from their own acts in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction, to become traders, farmers, and to follow professional pursuits.

It must be assumed in considering this question that the Indians themselves have determined to abandon the policy of exclusiveness, and to freely admit white people within the Indian Territory, for it cannot be possible that they can intend to demand the removal of the white people either by the Government of the United States or their own. They must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time it was abandoned forever."

It is common knowledge of persons conversant with local history that the situation had become such in 1893 that Congress decided that existing conditions should be changed, and that steps should be taken looking to ultimate statehood for Indian Territory and its inhabitants, Indian as well as white. By the appropriation act of that year, 27 Stat. at Large 612-645, a committee consisting of three members was provided for, to enter into negotiations with these tribes for the purpose of the relinquishment of the tribal title and the allotment of the lands in severalty to the individual members, having in view the ultimate creation of a state or states of the union which

196 would embrace these lands. Up to this time, the policy of the government had been to exclude white persons from these lands and from commingling with these Indians, but experience had shown this could no longer be done. The Indians themselves, by permitting intermarriage and by various ways, had defeated the governmental policy, and the white non-citizen population in the Indian Territory greatly outnumbered the Indians, and were constantly increasing. They were not amenable to the Indian Government. The Indian governments were far from satisfactory to the Indians themselves. Such was the condition that the Senate committee was forced to report:

"It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government cannot be continued: it is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change cannot be much longer delayed. There can be no modification of the system. It cannot be

reformed; it must be abandoned and a better one substituted." *Stephens vs. Cherokee Nation*, supra, p. 451.

This was the situation which forced Congress to a radical change of policy and a determination to effect a state government for Indian Territory as soon as it could be accomplished consistent with the rights and interest of the Indians. In the Indian Appropriation Act of 1896 (29 Stat. 321) Congress said:

"It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory, and afford needful protection to the lives and property of all citizens and residents thereof."

The work of preparing for this change fell upon the commission, first known as the Dawes Commission, and, latterly, as the Commission to the Five Civilized Tribes, acting under successive Congressional enactments and agreements with the tribes. The titles to the lands occupied by the various tribes vested in the respective tribes, and not in the individual members. *Cherokee Nation vs. Journey-ake*, 155 U. S. 196; *Shulthis vs. MacDougal*, 162 Fed. Rep. 331.

The work of the committee was first to determine who were the members of the tribes, and then to effect a division or allotment of the lands among them. Agreements were entered into with the various tribes, pursuant to which this allotment of lands was made.

In most instances the allottee took his land subject to restrictions upon alienation or incumbrance for a specified time, and 197 it is the alleged sales or other disposition of such lands by the allottee before the expiration of the restriction period that has given rise to most of the suits now being considered. Their purpose is to restore to him the possession where he is not now in possession, and to cancel and annul, as a cloud upon the title, all instruments involved in such sales or disposition. It is clear, therefore, that the allottee himself is vitally interested in the relief sought. Are his personal status and his relations to the United States such that these suits may be maintained solely in the name of the United States? As to his personal status, a pertinent inquiry is,

Are the members of the Five Civilized Tribes citizens of the United States? At the time they were granted the land comprising the Indian Territory and during all the years they held the same up to the time when Congress first took active steps to effect an allotment in severalty, they were not citizens of the United States. *Elk vs. Wilkins*, 112 U. S. 99.

In the act of Congress of May 2, 1890, 26 Stat. 99, establishing United States court in Indian Territory, it was provided that "Any member of any Indian tribe or nation, residing in the Indian Territory, may apply to the United States Court therein to become a citizen of the United States, and such court shall have jurisdiction thereof and shall hear and determine such application, as provided in the Statutes of the United States." But few Indians availed themselves of this privilege.

In the Indian Appropriation Act of March 3, 1893, 27 Stats. 645, is found the following provision:

"The consent of the United States is hereby given to the allotment of land in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

In the general allotment act of 1887 these Indians had been specifically excluded from its provisions. That act provided that those Indians receiving allotments under its terms should become citizens of the United States. Now, six years later, Congress, by the section just quoted, consents that the Five Civilized Tribes may allot lands in severalty to each of their members, as they may deem proper, and upon such allotment extends to such allottees the right of United States citizenship in all respects.

Section 16 of the same act provides for the Commission to the Five Civilized Tribes to enter into negotiations with the tribes for the purpose of the extinguishment of the national or tribal title to their lands and the allotment of the same in severalty to the individual members, with the view to such an adjustment upon the bases of justice and equity, as met with the consent of such nations or tribes of Indians, so far as may be necessary, requisite, and suitable to enable the ultimate creation of a state or states of the union, which shall embrace the lands within said territory. The consent to allotment expressed by Congress in section 15 was necessary, because under the grants conveying these lands to the tribes, they could only be held by the Indians in their tribal capacity until such time as Congress should consent to a different holding. Sections 15 and 16 should be construed together. The purpose of Congress, as repeatedly expressed in this act, was to make an equitable division of the tribal or communal property both personal and real, among the individual members of the tribes, to the end that a state might be formed. To do this, the title had to be changed from tribal to individual, and Congress cleared the way for such distribution of property by consenting thereto. The tribes were then free to make such division, should they desire to do so, and it was the office of the Commission to endeavor to procure their consent to do so. The motive of Congress was to secure ultimate statehood, of which state the Indians should be citizens. It is of course presumed that Congress in this legislation had in view what it conceived to be the greatest good to all concerned. It was not disposed to force statehood upon these people, even if it could have done so. But it could and did take the lead in two very important steps, looking to statehood, that of consenting to allotment and extending to allottees the privileges and immunities of United States citizenship. This was in 1893. It is

now a matter of common knowledge that the Commission experienced many difficulties in reaching agreements with the tribes and much delay followed. It developed that it had a work of much more magnitude than had first been contemplated, and, from time to time, Congress enlarged its scope, and by successive acts provided more in

200 detail for the accomplishment of allotment and division of the lands. In 1901, its work was still unfinished; in fact, it was then just well begun. As yet but few of the Indians had taken their allotments, and as these were not taken under the scheme provided by the act of 1893, it is doubtful whether they thus became citizens. By act of Congress of March 3, 1901, 31 Stat. 1447, section 6 of the general allotment act of 1887 was amended by inserting the words "and every Indian in Indian Territory." So that the portion of the act relating to citizenship read "and every Indian born within the Territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, and every Indian in Indian Territory, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Section 8 of the Act of 1887 as originally passed, read as follows:

"That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies, and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order." Kappler's Laws, Vol. 1, 35.

It is contended that the amendment of 1901 made the act ambiguous and contradictory. It must be presumed that Congress had in mind all the terms of the act that was amended. It is clear that Congress meant to say and did say by the Amendment "every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens * * * without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The language is clear, and its intent and meaning cannot well be mistaken, and if in the other parts of the act as originally passed there are found provisions in conflict with the clear purpose 200 and intent of the amendment, they are in my judgment, so far as they conflict with the amendment, repealed by implication; but attention is called to the fact that section 6 was again amended by the act of May 8, 1906, 34 Stat. 182. It is clear that the main purpose of this amendment was to provide that the allottee

under the general allotment act of 1887 should not become a citizen of the United States upon delivery of the trust patent, but that such citizenship should be deferred until delivery of patent in fee simple. It is also observed that the words "and every Indian in Indian Territory," constituting the amendment of 1901, are omitted, and the section as amended is made to include this provision, "and provided, further, that the provisions of this act shall not extend to any Indians in the Indian Territory."

At the same session and only a few days before Congress had passed an act providing for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory, and was then considering the Oklahoma Enabling Act, which was passed shortly afterwards. It was natural, therefore, that having specially legislated for the Five Civilized Tribes, they should in amending this general allotment act exclude therefrom all reference thereto. But the status of United States citizenship had attached to the individuals of the Five Civilized Tribes by the amendment of 1901. Without determining whether Congress could, without the consent of a citizen of the United States and without any act on his part forfeiting the same, withdraw such citizenship, it will not be presumed that Congress even intends to do so, except where such interest is expressed in clear and unmistakable terms, and, in my judgment, the amendment of 1906 does not admit of such construction.

On June 16, 1906, Congress passed the Oklahoma Enabling Act, in the preamble of which it is described as "An act to enable the people of Oklahoma and the Indian Territory to frame a constitution and state government, and be admitted into the Union on an equal footing with the original states."

In this act it was further provided "that the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as herein-after provided." And in that act it was further provided:

That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory and Oklahoma, and
201 who have resided within the limits of said proposed state for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed state; and all persons qualified to vote for said delegates shall be eligible to serve as delegates."

Whether the Indians of the Five Civilized Tribes at the time of the passing of the Enabling act were citizens of the United States or not, its terms clearly make them electors and give them the right to participate in the formation of the state constitution and state government, if they were inhabitants of the area in the proposed state, and are members of Indian nations or tribes. In fact, several of them were members of the Constitutional Convention. The constitution framed pursuant to the Enabling act provides that the qualified electors of the state shall be male citizens of the United States, male citizens of the State, and male persons of Indian descent, native of the United States, who are over the age of 21 years, etc. Upon sub-

mission of the constitution, as provided in the Enabling act, the President of the United States proclaimed statehood. The members of the Five Civilized tribes participated in all state, county and municipal elections; hold state and county offices; a member of the Chickasaw nation is now a representative in Congress, and a member of the Cherokee nation is now a United States senator from Oklahoma. In *Boyd vs. Thayer*, 143 U. S. 170, it is said:

"Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafter be controlled, and it also involves the adoption as citizens of the United States of those whom Congress makes members of the political community; and who are recognized as such in the formation of the new state with the consent of Congress."

In my judgment, therefore, the members of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges and immunities of citizenship. I am not unmindful of the fact that Congress by joint resolution of March 2, 1906, continued the tribal governments "in full force and effect for all purposes under existing laws, until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members." And that by act of Congress approved April 26, 1906, tribal existence was continued in full force and effect for all purposes authorized by law until otherwise provided by law."

But by various and successive acts of Congress these tribes have been shorn of their governmental functions; their courts have
202 long been abolished; their principal chief, or governor, as the case may be, is subject to removal by the President, who may fill the vacancy by appointment. Provision is made that their public school system shall be superseded by the state public school system; tribal tax is abolished; provision is made for the sale of their public buildings and lands; their legislature shall not be in session for a longer period in any one year than thirty days, and no act, ordinance, or resolution thereof except resolutions of adjournment, are valid without approval by the President. In *Buster vs. Wright*, 135 Fed. 951, Judge Sanborn said:

"Between the years 1888 and 1901, the United States, by various acts of Congress deprived this tribe (Creeks) of all its judicial power and curtailed its remaining authority until its powers of government have become the merest shadows of their former selves."

So it is with all the Five Civilized Tribes; but there is still undistributed tribal property, and until this is divided, it is essential that the tribal entity shall be maintained. In my judgment, the existence of this undistributed tribal property was the main reason for continuing the tribal existence, and such must have been the principal motive actuating Congress when the resolution of March 2, 1906, was passed, providing for the continuance of tribal existence "until all property of such tribe, or the proceeds thereof, shall be distributed among the individual members of said tribes." It is a continuance of the tribe in mere legal effect, just as in many states corporations are continued as legal entities after they have

ceased to do business, and are practically dissolved, for the purpose of winding up their affairs. It is not in my judgment a tribal existence incompatible with the enjoyment of full citizenship in the United States by the members of the tribes. Nor does the fact that these Indians have had restrictions upon alienation imposed upon their allotments necessarily affect their political status as United States Citizens. In *Re Heff*, 197 U. S. 508.

Can the right to maintain these suits be based upon treaty provisions relating to the protection of these Indians in their possession of the lands originally granted to the tribes? The grants of land made under the act of Congress of May 28, 1830, (4 Stats., 411) and the treaties entered into pursuant thereof, were to the tribes as such, and not to the individual members. This is clear from the fact, as we have seen, that it was then contemplated that these lands were so remote that they would never be desired for white settlement. It was then the policy of the government
203 to perpetuate the existence of the tribe, and there was no thought of tribal dissolution and the individual holding of the land. The Guarantees in the treaties related to tribal protection, and in my judgment cannot be invoked by the individual allottee under the changed conditions now existing. They imposed no duty or obligation upon the United States upon which these suits may be based.

The trust relation of the government recognized in *Beck vs. Flournoy Co.*, 65 Fed. 30, and kindred cases, known as the *Flournoy cases*, as arising from the fact that the legal title to the lands there involved was still retained in the government, does not exist here. It is alleged that by reason of the duties, obligations, and rights of the government, as set forth in this bill, the government is charged with the duty of protecting in the Courts the rights of the said tribes and members thereof, and in their behalf is charged with a trust of a high and delicate character. This is but a repetition of the allegations of guardianship, and we have now to consider whether in view of existing legislation and the present status of the individual allottee of either of the Five Civilized Tribes, these suits may be maintained by the United States as guardian for the Indian, acting in his stead, and without making him a party.

Does the relationship of guardian and ward now exist between the United States and the allottee with reference to his restricted land, in the sense originally recognized between the United States and the tribe and members thereof with reference to tribal property? The theory upon which this relation of guardianship arose and was recognized for so many years is well stated in the *United States vs. Kagama*, 118 U. S., at page 383, et seq., as follows:

"These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owed no allegiance to the States, and received from them then no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of deal-

ing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. * * * The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

It is evident the court has in mind the tribal Indians, "communities dependent upon the United States. Dependent largely for their daily food. Dependent for political rights. They owed no allegiance to the States, and received from them no protection." To this class of Indians the court say there arises the duty of protection, and with it the power. Congress and the courts have long recognized the relation of guardianship in such case, and such a relation was recognized as existing over the Five Civilized Tribes before the allotment, and in my judgment so exists now, with reference to tribal property. *Choctaw Nation vs. United States*, 119 U. S. 1.

The relation of guardianship is not established by Congress expressly saying in any particular act, "the United States is hereby declared to be the guardian of the Indians," but was deduced by the courts from a consideration of natural conditions and constitutional and legislative provisions, as being that most nearly approaching the peculiar relation existing between the United States and the Indian tribes when the matter was first presented for judicial consideration. (*Cherokee Nation vs. Ga.*, 5 Peters 1) and of course recognized as continuing so long as the conditions giving rise to it existed. But Congress may terminate this relation at any time. As said by Mr. Justice Brewer, in the *Heff* case, (197 U. S. 499):

"Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one sui juris. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true, there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear, the question is at an end."

Whether the relation is now terminated or materially changed by Congress, we are to determine from a consideration of recent legislation and change wrought thereby. As the relation was not established by any express provision, neither is it

necessary to its termination. These allottees are now citizens of the United States and citizens of the State of Oklahoma. (Slaughter House Cases 16 Wallace, 36). As such they have the right to make and enforce contracts; to sue; be parties; give evidence, and to inherit, purchase, lease, sell and convey property. Civil Rights Case 109 U. S. 1. The fact that the allottee holds land all or a part of which is alienable for a fixed period does not affect his civil or political status. In *re Heff*, *supra*. Nor does it follow that because as a citizen he may make contracts generally with reference to his property, that he may therefore dispose of restricted lands before the expiration of the restricted period. *Flournoy cases*, *supra*.

In 19th Opinions of Attorneys General, at page 232, Mr. Garland said of the effect of the general allotment act of 1887, whereby individual allottees were given the right of occupancy of separate tracts, the title to which the Governments held in trust for twenty-five years:

"In this new mode of life, the guardianship which heretofore has been exercised over the tribe is to be transferred to the individual allottees provided for in this act. * * * Prior to the issuing of the second patent, the United States is to act as trustee of the lands. This relation as to the lands is substituted for the guardianship heretofore exercised over the tribe."

United States vs. Dooley, 151 Fed. 697, was a recent case instituted in the United States circuit court, E. D. Washington, by the Government in its own behalf to cancel a deed made by Susan Swasey, an allottee holding a trust patent, to the other defendants, the Allottee, Susan Swasey, is made a party defendant. Concerning the relation of the allottee to the Government, the Court says.

"The contention that the relation of guardian and ward exists between the complainant and the allottee cannot be sustained, for the statute terminated that relation, at least in so far as it affects her personal acts and political status as an Indian. Such was the holding in the *Matter of Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848. The argument that the same relations exists between the Government and the Indians since as before the passage of the act was answered by Mr. Justice Brewer in delivering the opinion of the court as follows: 'But the logic of this argument implies that

206 the United States can never release itself from the obligation of guardianship; that, so long as an individual is an Indian by descent, Congress, although it may have granted all the rights, and privileges of national and therefore state citizenship, the benefits and burdens of the laws of the state, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the state, and release him from obligations of obedience thereto. Can it be that, because one has Indian and only Indian blood in his veins he is to be forever one of a special class over whom the general government may in its discretion assume the rights of guardianship which it had once abandoned, and this whether the state or the individual

himself consents? We think the reach to which this argument goes demonstrates that it is unsound.'

The right to maintain the suit must therefore rest upon other grounds [that] that of the relation of guardian and ward, but it does not follow that because such status has been abolished that the government is remediless. The authority rests upon another well defined principle. The complainant is still vested with the legal title to the land, etc."

In *Ex parte Savage*, 158 Fed., 205, Judge Pollock, of the Kansas District, said:

"Since the decision by the supreme court in the case in *Re Heff* * * * it cannot be doubted, I think, under act of Congress of February 8, 1887, * * * when Indians have been allotted in severalty and have received their patent, they are no longer wards of the government, but are citizens of the United States and of the state in which they reside, and are entitled to all the rights, guaranteed to citizens of such state."

In the act of 1887 not only were the allottees restricted from selling the lands but the legal title thereto was reserved in the United States during the restriction period. The allottees here involved are restricted from selling for a fixed period, but the title is not reserved. Certainly if in the former case the relation of guardian and ward does not exist, it does not in the latter, unless for some other reason. Had it been the desire of Congress and the Five Civilized Tribes that the trust relation provided in the general allotment act should prevail here, it could readily have been accomplished by providing that the title should be held in trust by the tribe for the restricted period, to be finally patented to the allottees free from incumbrance, etc. The trust relation of 207 the tribe and the unquestioned right of the government to control tribal property would, in my judgment, have entitled the United States to sue in behalf of the tribe to cancel any conveyance made by the allottee. This of course would have involved the continuation of the tribe in legal effect during the restriction period, or until other disposition of the trust was provided, and it is probable that if such a disposition of the matter was considered it was not adopted because of the desire to sooner abolish tribal existence. It is to be remembered that the act of 1893, 27 Stat. 645, contemplated the extinguishment of the title, either by cession to the United States or by allotment to the individual Indians. Had the former been done, then allotment could have been effected similar to that under the act of 1887; but this was not done. The restrictions upon alienation were placed upon these lands for some purpose, however. Let us see what it was. In *Beck vs. Flournoy Company*, 65 Fed. 34, Judge Sanborn says:

"The motive that actuated the lawmaker in depriving the Indians of power of alienation is so obvious, and the language of the statute in that behalf is so plain as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians."

Speaking of restricted allotments, under the general act, Judge Phillips says, in *Goodrum vs. Buffalo*, 162 Fed. 817,

"Accordingly, while authorizing the allotments in severalty, Congress conceded the lands with a firm cable attached to hold them to the exclusive use and possession of the Indians without qualification, restricting the power of divesting themselves of the use and title until after the fixed period."

There are numerous cases holding that the attempted conveyance of restricted allotted land is void, and that the purchaser, even though he has paid the purchase price, does not secure even an equitable title, nor can title be built up by adverse possession, estoppel, or any statute of Limitations. *Clark vs. Akers*, 16 Kansas, 166. *Shelton vs. Donohoe*, 40 Kansas, 346. *Schrumpacker vs. Stockton*, 183 U. S. 295. *Beck vs. Flournoy Company*, 65 Fed., 30. *Harris vs. Hardridge*, 166 Fed. 109. *Goodrum vs. Buffalo*, 162 Fed. 817.

In the Buffalo case last cited, Judge Phillips says:

"There is but one opinion among the courts, with the single exception of the ruling in said United States Court of Indian Territory, as to the construction of such acts of Congress and patents made thereunder; and that is, that any and all schemes and
208 devices resorted to for the purpose of acquiring title to the Indian allotments during the period of such limitation, are abortive. This for the palpable reason that it is a period of absolute disability on the part of the Indian to alienate his lands."

It follows that in any case wherein an allottee has been induced to dispose of any of his restricted land contrary to the laws under which it was set apart to him, he may, if the pretended purchaser has gone into possession, bring suit in ejectment and recover the same, and no rights accrue to the defendant in such cases by virtue of such transaction which he can interpose as a defense. If in such case the allottee is still in possession, he can successfully defend against a suit brought by such pretended purchaser to secure possession by virtue of such pretended conveyance. He can, in short, institute and maintain any action in relation to his restricted land, which any other citizen might prosecute in relation to real property, and no deed, mortgage, lease, contract of sale, power of attorney, or other instrument of conveyance made by such allottee regarding his restricted land, contrary to the tribal agreements and acts of Congress relating thereto, can be legally urged as a defense to such action. As said by Judge Phillips, in the Buffalo case, *supra*:

"It should be understood, once and for all, that no scheme or device, however ingenious or plausible, concocted by any person, can avail to divest the Indians of the Title to their allotted lands within the period of limitation prescribed by Congress."

Having given the allottee the right of citizenship and clothed him with these unusual safeguards against his improvidence, has Congress in addition thereto, by the mere fact of placing restrictions upon the alienation of the land, intended thereby to reserve to the United States the right to sue in its own name to set aside such illegal transaction, and recover for the allottee such restricted property?

If such a right is reserved to the Government, and we are correct in the conclusion that the allottee is a citizen and may also maintain an action for the same purpose, then we have an anomalous condition under which, while the Government suit is pending in this court, the allottee, who is not a party here, if he sees fit, may go into the State court and sue the same defendant for the same relief. What rule of law is there binding the allottee by the suit in this court, to which he is not a party, even though it be professedly for his benefit? My attention is called to none, nor do I know of

209 any. Suppose a final decree is rendered in this court against the Government, with regard to any particular allotment, and suppose thereafter the allottee proceeds to bring suit in his own name against the same defendant or defendants, for identically the same cause of action and seeking identically the same relief, can these defendants plead as a defense in that suit the decree rendered here in a case to which the allottee was not a party? It is certainly extremely doubtful. In my judgment, the purpose of Congress to establish such an extraordinary condition as this, must appear very plainly to warrant a court in arriving at such a conclusion. In the *United States vs. Payne Lumber Company*, 206 U. S., at page 473, it is said:

"The restraint upon alienation must not be exaggerated. It does not of itself divest the right below a fee."

It must be borne in mind that the cardinal purpose of Congress was the creation of a state, of which the Indians were to be citizens. Continued guardianship of the Indians was incompatible with citizenship, national and state. In my judgment when Congress clothed the allottee with full citizenship and to provide against his improvidence, vested in him title to his alienable land, so that no scheme nor device, however ingenious, could divest him thereof, it did so for the very reason that in carrying out the original plan of statehood, which was to include the Indian, his status as ward of the Government was not in the nature of things compatible with full citizenship in the state and union, and that it was not intended by Congress that the guardianship should longer continue.

(*United States vs. Auger*, 153 Fed. 671.)

By this I do not mean to say that Congress may not make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if statehood had not ensued, for it reserved that right in the enabling act. But we are not now concerned with what Congress may do, but what it has done. I am not unmindful of the Act of March 3, 1905, and subsequent acts relative thereto. By the act of March 3, 1905, (33 Stat., Part 1, 1060) it is provided:

"It shall be the duty of the Secretary of the Interior to investigate, or cause to be investigated, any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, and he shall in any such case where in
210 his opinion the evidence warrants it, refer the matter to the Attorney General for suit in the proper United States Court

to cancel the same, and in all cases where it may appear to the court that any lease was obtained by fraud or in violation of such agreements, judgment shall be rendered, cancelling the same upon such terms and conditions as equity may prescribe, and it shall be allowable where all parties [—] interest consent thereto to modify any lease and to continue the same as modified; Provided, no lease made by any administrator, executor, guardian, or curator which has been investigated by and has received the approval of the United States Court having jurisdiction of the proceeding shall be subject to suit or proceeding by the Secretary of the Interior or Attorney-General".

The act of March 1, 1909 (34 Stat., Part 1, 1026), contains this provision:

"To enable the Secretary of the Interior to investigate or cause to be investigated any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud or in violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the Act approved March third, nineteen hundred and five, ten thousand dollars."

The act of April 30, 1909, (Indian Appropriation Act), also provides:

"To enable the Secretary of the Interior to investigate or cause to be investigated any lease, power of attorney, contract, deed, or agreement to sell any allotted land which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the Act approved March third, nineteen hundred and five, ten thousand dollars.

This act is a legislative declaration that in 1905, before it was passed, no duty devolved upon the Secretary to supervise the allottee in the leasing of his land, except where the law specially provided that such lease should be subject to his approval. In *Beck vs. Flourney Company*, supra, Judge Thayer said:

"It is manifest that the amendment in question, authorizing allotted land to be leased in certain cases under the direction of the Secretary of the Interior, was unnecessary if power to execute leases of allotted lands had already been conferred by previous enactments or treaty stipulation. The last mentioned act, therefore, is a legislative

declaration that Congress did not intend by any previous
211 statute to authorize the leasing of any lands that might be assigned to Indians to be held by them in severalty."

But the Secretary of the Interior is charged with the supervision of all Indian Matters wherein the government still retains guardianship, and this duty would have existed without legislation, if at that time the government still retained the guardianship of the allottee with regard to the land covered by the lease referred to.

It is noted further that the matter is to be referred to the Attorney General for suit in the proper United States Court, and in the proviso they are referred to as suits or proceedings by the Secretary of the Interior or the Attorney General. Whatever may have been the status of the allottee in 1905, it is clear that in a suit now instituted under this provision to cancel or modify a lease, the allottee is

a necessary party. First: Because he is one of the main parties in interest and for reasons heretofore adverted to, is necessary to a complete determination of the controversy, And, Second: Because as one of the parties in interest his consent to any modification of the lease as provided for is necessary.

While the appropriation of April 30, 1908 is made to cover investigation by the Secretary of powers of attorney, deeds, or agreements to sell any allotted land, in addition to the leases, provided for in the original act and other appropriation acts, the act refers in terms to the original act, which provides only for suits by the Attorney General regarding leases. There is nothing in this legislation which, in my judgment, authorizes the government to maintain the suits at bar independent of the allottee and without making him a party. It follows that in the present bills is a defect of parties.

It is urged that even though the complainant may have the capacity to maintain these suits, the bills are subject to the objection of multifariousness, because numerous defendants are joined in each bill, for the reason that they are alleged to be connected with many distinct transactions regarding as many distinct tracts of land.

A bill is said to be multifarious when it improperly joins distinct and independent matters and thereby confounds them, as for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant. Or the demand of several matters of a distinct and independent nature against several defendants in the same bill. Words and Phrases, Vol. 5, P. 4615.

In *Barcus vs. Gates*, 89 Fed., 783, it is said:

212 "Multifariousness arises from the fact either that the transaction- which form the subject matter of the suit are so separate and dissimilar that they cannot conveniently be tried in one record, or that one defendant is able to say that as to a large number of the transactions set out in one bill he has no interest or connection whatever. A bill is not multifarious because there are several causes of action, if they occurred out of the same transaction, and if all the defendants are interested in the same rights and the relief against each is of the same general character, the bill may be sustained."

In *Hale vs. Allison*, 188 U. S., 56, the suit of [of] a receiver against numerous stockholders to enforce their liability, the Court approves and adopts the opinion of the District Judge McPherson, in the lower court. While that discusses the question of multiplicity of suits rather than multifariousness, the opinion is very pertinent to the situation here. In the course of the opinion, it is said:

"If, as is sure to happen, different defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. But even if the grounds of diminished trouble and expense may seem to be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the Court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many counsel will no doubt be concerned, whose conveniences must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be

large. The cost of witnesses will not in any degree be diminished, and if some docket costs may be escaped, that is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill [ever] separate action at law."

Suppose the court were to retain jurisdiction of these bills and require that the allottees all be made parties, either as plaintiffs or defendants. The bill would then essentially involve a multitude of separate suits, each by an allottee, the main party in interest, as plaintiff, and one or more but not all of the defendants, as defendants.

I appreciate fully the motive of the pleaders who conceived that the government was the only necessary plaintiff, so that each bill would be merely the suit of one plaintiff against various defendants, and, conceiving that each bill involved practically but one question of law, in the determination of which all of the defendants were equally interested, deemed it most practical to institute one suit instead of many.

213-224 But to my mind these bills, viewed from any standpoint consistent with the facts and conditions involved, each essentially combine a multitude of separate and distinct plaintiffs against separate and distinct defendants, and are subject to the objection of multifariousness.

There are other grounds of objection raised by the demurrer not necessary now to consider. For the reasons set forth in this opinion, the demurrers, in my judgment should be sustained, and the bills dismissed.

It is so ordered.

(Signed)

RALPH E. CAMPBELL, *Judge.*

Muskogee, Oklahoma, August 6, 1909.

Endorsed as follows: In the United States Circuit Court for the Eastern District of Oklahoma. The United States of America, Complainant, vs. James P. Allen, et al., Defendants. No. 284 and Similar Cases. Opinion Sustaining Demurrers. Filed Aug. 6, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

* * * * *

225 In the United States Circuit Court for the Eastern District of Oklahoma.

In Equity. No. 307.

THE UNITED STATES OF AMERICA, Complainant,
vs.

CHARLES E. MCPHERREN et al., Respondents.

Decree.

On this thirteenth day of September, 1909, on consideration of the demurrers to the bill filed by the various defendants herein, which were heretofore argued and submitted and by the Court taken

under advisement, the Court now finds that the complainant has not such an interest in the matters involved in this cause as entitles it to maintain this action; that the various allottees and patentees of the lands involved in this action are necessary parties thereto, and that there is, therefore, a defect of parties; and that the bill is multifarious.

It is the judgment of the Court that for the foregoing reasons the demurrers should be sustained.

It is therefore ordered, that the demurrers herein now being considered be sustained and the bill dismissed.

RALPH E. CAMPBELL, *Judge.*

226 Endorsed as follows: No. 307. The United States vs. Charles E. McPherren et al. Decree and Order. Filed in open court, September 13, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

227 (i.)

Prayer for Appeal.

Thereupon the complainant prayed an appeal in open Court, and that the Clerk be ordered to prepare and authenticate a transcript of the record, which said prayer for appeal and order are in words and figures as follows:

228 In the United States Circuit Court for the Eastern District of Oklahoma.

In Equity. No. 307.

THE UNITED STATES OF AMERICA, Complainant,
vs.
CHARLES E. MCPHERREN et al., Respondents.

Petition for Allowance of Appeal.

To the Honorable Ralph E. Campbell, Judge of said Court:

Comes now the above named complainant, by its solicitors, and considering itself aggrieved by the decree and order made and entered in this cause on the thirteenth day of September, 1909, does hereby appeal from said decree and order to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of error, which is filed herewith, and prays that its appeal be allowed, and that a transcript of the record proceedings and papers upon which said decree was based, duly authenticated and consisting of:

First. The bill of Complaint, except such transactions in Paragraph Six thereof, as to which special orders of dismissal have been heretofore entered on petition of complainant.

- Second. One copy each of the different demurrers filed herein;
 Third. Final Decree and Orders;
 Fourth. All endorsements of filings of documents above specified;
 Fifth. Copy of Appeal and Assignment of Error;
 Sixth. Copy of order allowing the same.
 Seventh: The Opinion of the Court,

may be prepared by the Clerk, and transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

THE UNITED STATES OF AMERICA,
 By GEORGE W. WICKERSHAM,

Attorney-General,

By A. N. FROST,

Special Assistant to Attorney General.

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(j.)

Allowance of Appeal.

Thereupon the Court allowed said appeal, and ordered the Clerk to prepare and authenticate a transcript of the record, as prayed for. Said allowance and order are in words and figures as follows:

The foregoing petition is granted, and the appeal allowed, and the Clerk is instructed to make and authenticate the record, as above set forth.

Done this Sept. 13th, 1909.

RALPH E. CAMPBELL, *Judge.*

230 Endorsed as follows: No. 307. The United States vs. Charles E. McPherren et al. Petition for Appeal and Order. Filed in open court September 13, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

231

(k.)

Assignment of Error.

Thereupon the complainant filed assignment of error, which said assignment of error is in words and figures as follows:

232 In the United States Circuit Court for the Eastern District of Oklahoma.

In Equity. No. 307.

THE UNITED STATES OF AMERICA, Complainant,

vs.

CHARLES E. MCPHERREN et al., Defendants.

Assignment of Error.

Comes now the complainant in the above entitled cause, by its Solicitors, and files the following assignment of error upon which

it will rely for grounds of reversal in its appeal from the order and decree made by this honorable court on the thirteenth day of September, 1909, in the above entitled cause:

That the court erred:

1.

In sustaining the demurrers filed herein, and ordering said cause dismissed.

2.

In holding that said cause could not be maintained in the name of the United States as sole complainant, for the reason that Congress has not so authorized, and for other reasons.

3.

In holding that the members of the Five Civilized Tribes are citizens of the United States.

4.

In holding that the allottees' personal status as citizens, and relation to the United States, are such that this suit cannot
233 be maintained solely in the name of the United States, and that the guardianship of the United States is incompatible with such citizenship.

5.

In holding that the guaranty of the United States and its guardianship extends only to the Five Civilized Tribes, and not to the individual members thereof.

6.

In holding that a termination of the relationship of guardian is shown by the legislative enactments with reference to the disposition of the affairs and property of the Five Civilized Tribes and its members, together with the alleged granting of citizenship.

7.

In holding that the restrictions placed on the alienation of the lands allotted to the members of the Five Civilized Tribes did not reserve to the United States the right to sue in its own name to set aside any transactions made in contravention of such laws against alienation, and to recover for the allottee his property so attempted to be alienated.

8.

In holding that there exists no duty, policy or power in the United States upon which can be predicated the right of the United States to maintain this cause in its own name.

9.

In holding that the allotment of the lands of the Five Civilized Tribes to its members, subject to certain restrictions, and the citizenship alleged to have been created, fulfilled any duty which may have

existed in the United States to any of the citizens of the Five Civilized Tribes.

10.

234 In holding that the allottees are necessary parties to this cause.

11.

In holding that there is a defect of parties in said bill.

12.

In holding that said bill is multifarious.

13.

In holding that there is a misjoin-er of causes of action in this bill.

14.

In holding that there is a misjoin-er of parties in this bill.

15.

In failing to hold that the Acts of Congress removing restrictions from the land of certain of the allottees of the Five Civilized Tribes did not affect the duty owed by the United States to secure the cancellation of any instruments attempting to convey the inalienable allotments of said allottees, and to restore to the said allottees the land so attempted to be conveyed while restricted, nor its right to bring an action in its own name as sole complainant for said purpose.

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16.

In failing to hold that the transactions set forth in paragraph six of the bill of complaint, being attempted conveyances by full blood heirs of lands inherited from deceased allottees of the Choctaw Tribe of Indians, where certificate of allotment had issued prior to April 26, 1906, were illegal at the date of the conveyances complained of:

(a) For the reason that said lands, prior to April 26, 1906, were inalienable:

(b) For the reason that said lands, subsequent to April 26, 1906, were inalienable except upon approval of the Secretary of the Interior, which, as set forth in the bill of complaint, has never been obtained:

(c) For the reason that said lands, subsequent to May 27, 1908, where the said heirs inherited from an ancestor dying prior to said date, were inalienable except upon approval of the Secretary of the Interior which, as set forth in the bill of complaint, has never been obtained.

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17.

In failing to order that said attempted conveyances, so complained of in this bill be cancelled, and possession of the lands involved therein be given to the heirs of the allottees thereof, and that the title of said allottees be quieted, and decreeing accordingly.

18.

In failing to rule that said demurrers should be overruled.

19.

In failing to decree that the United States, on the allegations of the bill, is properly the sole complainant, and entitled to the discovery and relief prayed for.

Wherefore; For these, and divers other errors appearing upon the record, the appellant prays that the decree and order herein be reversed, and that the United States Circuit Court of Appeals for the Eighth Circuit render such proper decrees and orders on the record as justice and equity demand.

THE UNITED STATES OF AMERICA,
By GEORGE W. WICKERSHAM,

Attorney-General.

By A. N. FROST,

Special Assistant to Attorney-General.

237 Endorsed as follows: No. 307. The United States vs. Charles E. McPherrren, et al. Assignment of Error. Filed in Open Court, September 13, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist., Okla.

238-257

(L.)

Authentication.

I, L. G. Disney, Clerk of the United States Circuit Court for the Eastern District of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct transcript of so much in said cause as the same appears on file and of record in my office at Muskogee as was ordered to be prepared and authenticated.

In testimony whereof, Witness my hand and official seal, this the 16th day of September, A. D. 1909.

[SEAL.]

L. G. DISNEY, *Clerk*,
By OTIS LORTON,
Deputy Clerk.

Filed Sep. 17, 1909, John D. Jordan, Clerk.

* * * * *

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(Order of Argument.)

And on the sixth day of December, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of argument in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

MONDAY, *December 6, 1909.*

No. 3152.

THE UNITED STATES OF AMERICA, Appellant,
vs.

CHARLES E. MCPHERREN et al.

Appeals from the Circuit Court of the United States for the Eastern District of Oklahoma.

The above entitled causes having been called came on to be heard this day. Mr. Assistant Attorney General Russell appeared as counsel in behalf of the United States, Mr. S. T. Bledsoe, appearing generally as counsel in behalf of all the appellees; The Creek nation citizens appearing by Mr. George S. Ramsey their counsel; the Cherokee nation citizens appearing by Mr. B. B. Blakeney their counsel; the Choctaw and Chickasaw nation citizens appearing by Mr. J. E. Humphrey their counsel; the Seminole nation citizens appearing by Mr. Joseph C. Stone their counsel and Mr. Robert L. Owen appearing in his own behalf.

Thereupon argument was commenced by Mr. Assistant Attorney General Russell and continued by Mr. S. T. Bledsoe, and the hour of adjournment having arrived the further hearing of these causes was postponed until tomorrow.

(Order of Submission.)

And on the seventh day of December, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

259 United States Circuit Court of Appeals, Eighth Circuit,
December Term, 1909.

TUESDAY, *December 7, 1909.*

No. 3152.

THE UNITED STATES OF AMERICA, Appellant,
vs.

CHARLES E. MCPHERREN et al.

Appeals from the Circuit Court of the United States for the Eastern District of Oklahoma.

These causes having been called this day for further hearing, argument was continued by Mr. S. T. Bledsoe, Mr. George S. Ramsey,

Mr. B. B. Blakeney, Mr. James E. Humphrey, Mr. Joseph C. Stone and Mr. Robert L. Owen and concluded by Mr. Assistant Attorney General Russell.

Thereupon each of the above named causes was submitted to the Court on the transcript of record as printed for the use of the Court in each of said cases and upon the briefs filed by counsel for various parties herein.

(Opinion)

And on the eighth day of June, A. D. 1910, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

260 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1910.

No. 3150.—United States, Appellant, vs. James P. Allen et al.

No. 3151.—United States, Appellant, vs. N. E. Patterson et al.

No. 3152.—United States, Appellant, vs. Charles E. McPherrren et al.

No. 3153.—United States, Appellant, vs. F. B. Severs et al.

No. 3154.—United States, Appellant, vs. Wilson Bruton et al.

No. 3155.—United States, Appellant, vs. Norman Pruitt et al.

No. 3156.—United States, Appellant, vs. James Jefferson et al.

No. 3157.—United States, Appellant, vs. J. J. Creamer et al.

No. 3158.—United States, Appellant, vs. Filix R. Phillips et al.

No. 3159.—United States, Appellant, vs. J. M. Dickenson et al.

No. 3160.—United States, Appellant, vs. James P. Allen et al.

No. 3161.—United States, Appellant, vs. Walter F. Nichols et al.

No. 3162.—United States, Appellant, vs. John F. McClellan et al.

No. 3163.—United States, Appellant, vs. Alfred F. Goat et al.

No. 3265.—United States, Appellant, vs. George C. Crump et al.

No. 3276.—United States, Appellant, vs. C. J. Benson et al.

No. 3279.—United States, Appellant, vs. J. O. Davis et al.

Appeals from the Circuit Court of the United States for the Eastern District of Oklahoma.

Mr. Charles W. Russell, Assistant Attorney General, for Appellant.

Mr. S. T. Bledsoe, Mr. George S. Ramsey, Mr. B. B. Blakeney, Mr. James E. Humphrey, Mr. Joseph C. Stone and Mr. Robert L. Owen, pro se, (Mr. A. W. Clapp, Mr. O. L. Rider, Mr. Kenneth S. Muchison, Mr. Wm. M. Matthews, Mr. C. L. Thomas, Mr. N. A. Gibson, Mr. Robert J. Boone, Mr. George C. Butte, Mr. Garfield Johnson, Mr. T. S. Cobb, Messrs. Crump, Rogers & Harris, Messrs. Willmott & Wilhoit, Mr. W. L. McCann, Mr. Thomas H. Owen, Mr. W. B. Crossan, and Messrs. Davis & Davis were with them on the briefs) for Appellees.

261 Before Hook and Adams, Circuit Judges, and Amidon, District Judge.

AMIDON, *District Judge*, delivered the opinion of the Court.

The lands of the five civilized tribes were allotted in severalty to their members, subject to express restrictions against their alienation for specified periods of time. The bills in these suits charge that many thousand conveyances have been made in violation of those restrictions, and the suits have been brought by the United States to have some four thousand of these conveyances declared to be void and cancelled of record. The restrictions against alienation arise out of numerous statutes and treaties, and vary according to such matters as the amount of Indian blood of the allottee, whether the land was a homestead, and whether it was held as an original allotment or by inheritance. The grantees under the conveyances are classified according to some distinct feature of the restriction upon alienation, and all grantees coming under each class are combined as defendants in a single suit. The allottees are not made parties either as plaintiff or defendants, and it is not charged in the bills that the conveyances were obtained by fraud, misrepresentation, or for an inadequate consideration. They are assailed solely upon the ground that they were made in violation of the restriction which Congress imposed upon the alienation of the allotments.

These bills were demurred to upon numerous grounds. The demurrers were sustained by the trial court for the reason (1) that the complainant has not such an interest in the matters involved as entitles it to maintain the action; (2) that the allottees are necessary parties, and that there is therefore a defect of parties; (3) that the bills are multifarious. A decree was entered in each case dismissing the bill upon the merits, to review which is the object of this appeal.

The consideration of the case will be simplified if it is understood at the outset that the plan of the government in dissolving the five civilized nations and distributing their lands in severalty, was not simply a real estate transaction. It was a great governmental project, having for its object the social and industrial elevation of the Indians. For the accomplishment of that result there were two main reliances: (1) the added incentive which comes from

the individual ownership of property as distinguished from its joint or tribal ownership; (2) the continuance of that ownership for such a period as should bring the Indian into a state where he could safely be trusted to protect his interests in the sharp competition with members of the white race. During all the years that this scheme was in process of execution, the Indian lands, like the Indians themselves, were subject to the supreme authority of the national government. The United States proceeded, in so far as it could, with the consent of the Indians. That, however, it did as a matter of wise governmental policy, and not in obedience to any constitutional restriction. Whenever it encountered the obstinate opposition of the Indians to its plans, it did not hesitate to set aside their will and substitute its own authority. The title to these lands was in the Indian tribes, and the formal conveyances to the individual members were made by tribal officers. All this, however, was done in obedience to the regulations of the national government. To attempt to cramp these large governmental measures to the narrow limits of a real estate transaction is to deprive them of their distinctive character. And yet much of the argument contained in the briefs, as well as the opinion of the trial court, treats these measures as a matter between grantor and grantee, and wherever they do not fit the private law of real property, they are declared to be ineffective.

The same observations may be made as to the statement of the relation between the national government and the Indians being that of guardian and ward. These are familiar terms in decisions dealing with Indian matters. They are however, words of illustration, and not of definition, and to attempt to reason from the private law of guardian and ward to the measures of the federal government in dealing with the five civilized tribes, leads only to confusion and the subversion of the real scheme of government.

Turning now to the objections which were made and sustained by the trial court, has the federal government such an interest as entitles it to maintain these suits? It will be conceded at the outset that it has no legal or equitable estate in the allotments; and if such an estate is necessary, it has no standing in court. It is, however, too plain for controversy, that the federal government imposed restrictions upon the alienation of these allotments. That restriction was its main reliance for the social and industrial elevation of the Indians. Has it a standing in Court for the enforcement of its policy? To say that it has not is to make the restraints upon alienation a mere brutum fulmen. Shall the Indians who are intended to be restrained, be made the sole agency for the enforcement of the restraint? If so, the act of Congress is nothing more than a benevolent admonition. If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a vio-

lation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation a pauperized, discontented and, possibly, belligerent people. To prevent such results the United States may invoke the aid of its courts. That question was put to rest in the decision of *In re Debbs*, 158 U. S., 564. When a suit in equity is an appropriate method for the enforcement of a governmental policy, the national government may maintain such a suit. The present case

263 presents a right of the nation which has been violated and cannot be redressed in any other way than by a suit in equity. If its interest in its measures does not give it a standing in court, then the violation of those measures must go wholly without redress. Governmental action cannot be thus paralyzed. If the aid of the court is an appropriate remedy, the government has the same right to proceed in that manner that it has to use executive power where that power is an appropriate agency for the accomplishment of its purposes.

The Supreme Court of the United States in the case which carried the emancipation of the Indians and their property to the fullest extent, expressly recognizes the right of the government to enforce, by appropriate action in court, the restraints which it imposed upon the alienation of Indian allotments. The court says in the *Heff* case, 197 U. S., 489, 509: "Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a National or state court. * * * Many a tract of land is conveyed with conditions subsequent. A minor may not alienate his lands; and the proper tribunal may at the instance of the rightful party enforce all restraints upon alienation."

Under the general allotment act of 1887, a provisional patent was issued to the allottee, and the naked legal title retained in the government for the period of twenty-five years. In the case of the five civilized tribes, this plan was modified to the extent of granting the legal title to the Indian, but imposing upon it a restraint against alienation. These plans present simply differences of method. The object sought in each case was the same, namely, to clothe the Indian with such title to the property as seemed best calculated to encourage his industrial development, and yet accompany this grant with such a restriction as would prevent the main reliance of the government for the industrial betterment of the Indian from being defeated by the alienation of the property. The right of the government to invoke the aid of its court to prevent the defeat of its object is the same under the one statute as the other. Its right to maintain a suit to prevent the defeat of its allotment scheme under the general law of 1887, is fully sustained in *United States v. Rickert*, 188 U. S., 432. It is contended, however, in the present case, that that decision is not controlling because there the government held the legal title

to the property for a period of 25 years in trust for the Indian, but subject to a restraint upon alienation, whereas here the legal title has been conveyed to the Indian. The decision in the Rickert case does not rest upon a principle of the law of real property but upon the power of the nation to enforce its own measures. At page 444 of the opinion the right of the government to maintain the suit is declared to rest, not upon the fact that it held the title to the property, but, to use the language of the court, upon "the injurious effect of the assessment and taxation complained of upon the plans of the government with reference to the Indians." In either case it is not a right of property which is enforced, but a plan of government. The Supreme Court there declares the right of the nation to maintain a suit for the enforcement of its policy in regard to Indian allotments to be too plain for argument. 188 U. S., 444. This statement is approved in *McKay v. Kalyton*, 204 U. S., 458, 467.

But we are not left to inference from the general scheme of the national government in its dealings with the five civilized tribes, to find authority for the maintenance of these suits. They are authorized by express act of Congress. The last paragraph of Section 6 of the Act of May 27, 1908 (35 Stat. at Large, 312), is a saving clause. Viewed solely in that light it declares the belief and intent of Congress that the rights which it saves, exist. It does not, however, stop with the language which saves the rights specified, but proceeds to declare the conditions upon which those rights shall be exercised by stating that the suits shall be brought upon the recommendation of the secretary of the interior, and without cost to the allottees. It thus passes beyond the scope of a saving clause, and uses language which is consistent only with the grant of the power to institute the suits. When this language is read in connection with the earlier part of the section appropriating \$50,000 to cover the expenses incurred by the attorney general in this litigation, the intent of Congress that the power to maintain the suits is granted, and its purpose that such suits should be instituted in proper cases, is clearly manifest. It is incredible that the purpose of Congress was simply to provide for the institution of suits to obtain a judicial determination as to whether the power of the government to maintain such suits existed. Congress, by its own declaration, could have placed that question beyond controversy, and the courts ought not to give a meaning to its acts which would make of them a mere squandering of public funds. That which is implied is as much a part of a statute as that which is expressed. *City of Little Rock v. U. S.*, 103 Fed., 418; *United States v. Babbitt*, 1 Black, 55. Implications far less clear than the power to maintain these suits, have been enforced by the courts. *Gelpcke v. City of Dubuque*, 1 Wall., 220; *Postmaster General v. Early*, 12 Wheaton, 135, 146; *Telegraph Company v. Eyser*, 19 Wall., 419; *Great Northern Railway Co. v. United States*, 155 Fed., 945. The trial court held that, because a statute conferring the jurisdiction here in question by more direct language, was not enacted, though brought to the

attention of the committee having the present act in charge, that this amounted to an expression of the legislative intent that the right itself either did not exist or was so doubtful that the only proper procedure was to make provision for a judicial determination of its existence. Courts can find the intent of the legislature only in the acts which are in fact passed, and not in those which are never voted upon in Congress, but which are simply proposed in committee. It is not contended that the bill referred to was ever brought

to a vote in Congress and rejected. It was simply one of the 265 measures which was under consideration at the time the act of May 27, 1908, was passed. To hold that such facts can be looked to for the purpose of narrowing the effect of a statute actually passed would be to invent a new and dangerous canon of statutory interpretation.

Much of the briefs is devoted to arguments deduced solely from the fact that Congress has conferred national citizenship upon the Indians. These arguments have been frequently presented to the courts, but so far as we are aware, they have never defeated the exercise of national authority over the Indian except in the *Heff* case, 197 U. S., 488. That decision, however, as now explained by the Supreme Court in *United States v. Celestine*, 215 U. S., 278, lends no support to the defendants. The case arose under the general allotment act of 1887. That statute provides that, upon the completion of the allotments, the Indians "shall have the benefit of, and be subject to the laws, both civil and criminal, of the State." Mr. Justice Brewer carries this feature of the statute through his opinion at every step as the basis of the decision of the court. He has now removed all possible doubt on the subject by his opinion in the *Celestine* case, where he expressly states that the *Heff* opinion rests upon the fact that under the general allotment act Congress has, by direct provision, entirely renounced its own authority over the Indians, and subjected them to the laws of the state, both civil and criminal. The decision of the *Heff* case simply gives effect to this positive declaration of the legislative intent. In its dealings with the five civilized nations, Congress has been at great pains to indicate a different purpose. Here it has from time to time down to the organic act admitting Oklahoma, and the provisions which it insisted should be embodied in the constitution of that state, reserved to itself express authority to pass such laws with respect both to the Indians and their lands, as shall in its judgment seem wise. In the present case, though it conferred citizenship upon the Indians, it accompanied its grant of the allotments to them with an express provision against their alienation. The difference between the present case and the *Heff* case is this. In the former case Congress expressly renounced its own authority over the Indians, and subjected them to the laws, both civil and criminal, of the state. Here Congress, with equal explicitness, has imposed a restraint upon the alienation of allotments. It is as much the duty of the courts to give effect to the legislative intent in the present case as in the former. See also *U. S. v. Sutton*, 215 U. S., 291.

The grant of citizenship to the members of the Five Nations, was intended for their protection, and not to strip them of the protection of the national government. It was, in our judgment, never the intent of Congress to deprive itself of the authority which it had always exercised to adopt such measures as in its judgment were wise for the protection of the Indian in his rights among the more highly developed members of the white race. Conceding the Indians to be citizens of the United States and of the state of their residence, this court still said in the case of *United States v. Thurston County*, 143 Fed., 287, 288: "Their civil and political status, however, does not condition the power, authority or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. They are still members of their tribes and of an inferior and dependent race." Clothing them with citizenship did not change their character or invest them with full industrial capacity. These records are eloquent on that subject. An intent to destroy the authority of the national government to protect the Indian, ought not to be deduced as a mere speculative inference from the definition of citizenship. Such a radical change of national policy should emanate only from express and unequivocal language.

Section 1 of the act of May 27, 1908, removes all restraints upon alienation as to several classes of allotments. Section 6 of that act provides for the appointment of representatives of the secretary of the interior to counsel and advise Indian allottees having restricted lands, with reference to the same, and also authorizes these agents to bring suits in the name of the allottee to cancel and annul any conveyance or encumbrance thereof made in violation of any act of Congress. These provisions standing alone, would afford a strong implication against the right of the government to maintain these suits in its own name as to lands that are freed from restriction by section 1. The Indian as a citizen of the United States has a clear right to maintain any suit necessary to set aside illegal conveyances of his property. By Section 1 of the act he is vested in certain cases with an unrestricted right to dispose of his allotment. How can the Attorney General contend that as to lands thus freed from restriction by the government he is truthfully representing its present policy by prosecuting these suits in its name? Again, it might well be urged that, inasmuch as Congress has authorized the agents of the secretary of the interior to maintain suits in the name of allottees to cancel any instrument executed in violation of law, it has thereby indicated its intent that no other governmental agency should institute such suits. These contentions, in our judgment, would be controlling were it not for the last paragraph of Section 6 of the act. It reads as follows:

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit, and the prosecution and appeal

thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof."

267 "Nothing in this act" includes the provisions from which the implication is drawn against the right of the government to maintain these suits. The later language of the paragraph extends that right to all conveyances which "have been made contrary to law with respect to said lands prior to the removal therefrom of restrictions upon the alienation thereof." According to the averments of the bills, every conveyance here involved falls clearly within these words. To deny the right of the government to maintain these suits is to repudiate the plain language and manifest object of the paragraph which we have quoted. The Indians and their lands were subject to the supervision of the secretary of the interior, and the act provides that the suits shall only be brought on his recommendation. The power of Congress to confer such an authority is beyond question. Whether the suits should be brought presents a question of administrative rather than judicial discretion. If Congress saw fit to reinvest allottees with a clear title to their allotments before freeing them from restraint by section 1 of the act, that is clearly a subject with whose wisdom the courts cannot interfere. It is our duty to give effect to the intent of Congress as declared by the statute. The Supreme Court in the case of *United States v. Celestine*, 215 U. S., 278, again enforces the duty of the courts to construe legislation of Congress in relation to the Indians so as to promote their interest. Applying that canon, we entertain no doubt of the right of the government to maintain these suits. They are brought in the name of the United States to enforce a right created by federal law. The jurisdiction of the Circuit Court is therefore plain.

Is there a defect of parties? The rule as to parties in equity was early stated by Mr. Justice Curtis in language so accurate and comprehensive that it has since been accepted by all federal courts. He says that parties are: "1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, 17 How., 129, 139.

The Supreme Court in *Waterman v. Canal Louisiana Bank Co.*, 215 U. S., 33, 49, after quoting the above language with approval, condenses the rule as to indispensable parties as follows: "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between 268 the parties actually before the court, without injuriously affecting the rights of such absent party." That is the real ground of the decision of the Supreme Court in *Minnesota v. Northern Securities Company*, 184 U. S., 199. The decree there could not be enforced against the Northern Securities Company without destroying the rights of the Northern Pacific and Great Northern Railroad Companies, and their stockholders, who were not parties. See also *Rogers v. Penobscott Mining Co.*, 154 Fed., 615. The allottees in the present case do not come within the class of indispensable parties as thus defined. The cause of action set up in the bill is not theirs but the government's. True, if the government succeeds their titles will be cleared of clouds; but if it does not succeed, they will be left with their personal causes of action unaffected by what is done in the present litigation. It may be said that this very fact makes the presence of the allottees necessary to complete justice to the defendants. While the measure of justice in their favor would be more complete if the allottees were present, that fact does not render the allottees indispensable parties. It is not the mere convenience of the parties before the court which renders absent parties indispensable, but the protection of the rights of those absent parties. Looking at the entire litigation, justice to the defendants will also be promoted by this practice. The Indians have already parted with their lands by deed. While they have the legal right to assail the conveyances if they were made in violation of the statute against alienation, the exercise of that right by the Indians after a decision against the government in the present suit, is so problematical that it would be oppressive to compel the plaintiff to bring all allottees before the court, and would also add unnecessarily to the costs of the defendants in case the suits shall go against them. Again, the allottees, if present, would have no control over the suits. Their consent to a judgment in favor of the defendants would not defeat the right of the government. In our judgment, therefore, there is no defect of parties.

The defense of multifariousness is without merit. That defense, as the Supreme Court has frequently declared, is "very largely a matter of convenience." *United States v. Bell Telephone Co.*, 128 U. S., 315, 352; *Graves v. Ashburton*, 215 U. S., 331, 335. It is addressed to the sound discretion of the court. The convenience both of the defendants and the government is conserved by joining in one action all such conveyances as the government claims are invalid because made in violation of a specific statute.

Only one question remains for consideration. The statutes imposing restraints upon alienation were changed from time to time between the year 1893, when the allotment of the lands in severalty began, and the time of their completion some fifteen years later. It is earnestly contended by the defendants that after allotments had

been made subject to a specific limitation, the government was without power to enlarge the period of that limitation; that the Indian obtained a vested right in his allotment, subject only to the restriction which was imposed upon it at the time the allotment was made, and that to enlarge the period of the restriction would be an impairment of his vested rights, in violation of the 14th Amendment to the Constitution. So long as the lands were held by the Indian allottee, or by an Indian who claimed under him by inheritance, we do not think this contention is sound. The grant of citizenship to the Indian did not destroy the right of the federal government to regulate and restrict his use of these lands. Though a citizen of the United States, he did not cease to be an Indian, and both he and his property remained subject to the national government. Congress has from time to time asserted this authority, and to hold that its enactments in that regard are unconstitutional, would be disastrous to the Indian, and would probably still further confuse the already complicated title to lands in Oklahoma. The extension of the period of restriction under the general allotment act is referred to with approval in *U. S. v. Celestine*, 215 U. S., 291. It is, of course, true that conveyances of allotments to third parties in accordance with the law in force at the time the conveyances were made, could not be impaired by subsequent legislation on the part of Congress enlarging the period of restriction against alienation.

The whole scheme of allotment of lands in severalty to the Indians is an experiment. Congress, in the case of the Five Nations, has attempted to reserve to itself power to deal with the subject in the light of experience. If the plan proves a failure, after a fair trial, it would be disastrous, indeed, if the mere grant of citizenship to the Indian had placed him beyond the power of the federal government to adopt such measures for his welfare as experience should show to be necessary.

The decrees are reversed, and the trial court is directed to proceed with the suits in accordance with the views here expressed.

Filed June 8, 1910.

ADAMS, *Circuit Judge*, dissenting:

I am unable to agree with my associates that the United States can of its own motion without the request or consent of the Indians whose rights are involved maintain these suits to remove a cloud from their title. When the suits were instituted the individual Indians held title in fee simple absolute to their several allotments. The undivided interests which they originally owned in tribal property had been effectually partitioned in the process of allotment provided by the act of March, 1893, and subsequent acts supplemental thereto. Any reversionary interest of the United States dependent upon possible abandonment of the land or extinction of the tribe had been relinquished.

The United States, therefore, had no proprietary right legal or equitable to protect or safeguard by suit or otherwise. Moreover, the Indians had become citizens of the United States and of the State

of Oklahoma and had become entitled to all the rights, privileges and immunities of such citizens. As a result of all these things guardianship of the Government over them had ceased and the Indians had become completely emancipated from federal control. Laws restricting alienation, hereafter referred to, had been passed for their protection, but this fact does not militate against the completeness of their emancipation. *Matter of Heff*, 197 U. S., 488.

With no title legal or equitable to protect, and no duty of a trust character to perform, a new head of equity jurisdiction had to be discovered to justify the maintenance of these suits by the Government; and this, it is claimed, is found in the obligation of the government to enforce a great National policy. The *Debs* case, 158 U. S. 564, and others of that character are cited in support of this discovery; but they do not as I understand them justify Governmental intervention, in behalf of private citizens except in the discharge of duties entrusted to the care of the Nation by the Constitution. The intervention of the Government in the *Debs* case appears to be justified on the ground that power over interstate commerce and the transportation of the mails was vested in the National Government by the Constitution. Conceding, however, without admitting, that the Government may intervene as complainant to redress the wrongs of a limited number of citizens arising out of matters not committed to its control by the Constitution, I think the National policy with respect to the Five Civilized Tribes is entirely inconsistent with the right or duty of the United States to institute suit in its own name for their benefit. The majority opinion dwells largely upon that part of the Indian policy which prevailed before the cessation of the National guardianship, that part of it which concerned the treatment of the Indians before emancipation when a duty rested upon the Government to protect them and prepare them for citizenship; but that time and that duty have passed away. Congress in its wisdom has determined that the Indians of the Five Civilized Tribes are now fit for citizenship and qualified to perform its duties and carry its responsibilities. It has accordingly modified its former policy to meet the new conditions. It has endowed the Indians with rights and responsibilities intended and calculated to develop self-reliance, independence and thrift. Citizenship has been conferred upon them and title to lands in fee simple has been vested in them with the expectation that the responsibilities incident thereto: the defense of their rights, the redress of their wrongs, the establishment of homes, the support of themselves and their families and generally speaking, the practice of the arts of civilized life may aid them in their social and economic development. In view doubtless of the cupidity of men and of their own natural improvidence Congress with a view of encouraging and aiding them in their upward progress enacted (35 Stat. 312) that "All allotted lands of enrolled fullbloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell,

power of attorney, or any other incumbrance prior to April
 271 twenty-sixth, nineteen hundred and thirty-one" except by
 permission of the Secretary of the Interior.

The foregoing considerations, in my opinion, indicate that Congress has adopted a new policy concerning these Indians, namely: the promotion of self-reliance, self-respect, economy and thrift, and to this end after making the special provision above indicated and perhaps others of like character, has left them otherwise subject to general laws governing all citizens. Equality of opportunity is all an American citizen ought to demand; and this and more in the respects just indicated Congress has given the members of the Five Civilized Tribes. With these special provisions made in their behalf the legislative intent and purpose seems to have been to leave them to justify their right to citizenship by coping with other citizens in the affairs of life on an equal footing without the expectation or hope of other special Governmental intervention. Such intervention in the way of institution of suits at wholesale as done in these cases without the request or consent of the Indians is not only humiliating in itself but tends to defeat the true National policy by discouraging self-reliance and independence of action.

The policy of encouraging and aiding the Indians to act for themselves independently, rather than of aggressively interfering without their consent, to assert their statutory rights is distinctly recognized if not commanded in Sec. 6 of the act of May 27, 1908, above cited. Sec. 1 of that act as already pointed out imposes certain restrictions upon the alienation of lands by the Indians. Sec. 6 after authorizing the Secretary of the Interior or his representatives to take special interest in behalf of minors under guardianship enacts that: "said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and *at the request of any allottee* having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, *in the name of the allottee*, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands."

Notwithstanding other provisions of the act, referred to in the opinion of the majority, I think the part just quoted manifests a clear legislative intent and purpose that the United States by and through the Secretary of the Interior should act with respect to the violation of restrictions primarily in an advisory way and instead of
 272 ever bringing suits in its own name at pleasure, should bring
 them only when requested by allottees and then only in their names.

If these suits can be maintained it is not apparent where the Government can stop in its litigation in behalf of private persons in the enforcement of National policies. There are certainly many recognized policies besides the Indian policy which might be materially subverted by the practice of Governmental intervention as in this case. Where would it end?

In my opinion the judgment below should be affirmed.

Filed June 8, 1910.

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(Decree.)

And on the eighth day of June, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1910.

WEDNESDAY, June 8, 1910.

No. 3152.

THE UNITED STATES OF AMERICA, Appellant,

vs.

CHARLES E. MCPHERREN et al.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court with directions to proceed in accordance with the views expressed in the opinion of this court.

JUNE 8, 1910.

(Petition for Rehearing.)

And on the thirteenth day of July, A. D. 1910, a petition of appellees for a rehearing was filed in said cause, in the words and figures following, to-wit:

274 United States Circuit Court of Appeals, Eighth Circuit.

No. 3150.—United States, Appellant, v. James P. Allen et al.

No. 3151.—United States, Appellant, v. N. E. Patterson et al.

No. 3152.—United States, Appellant, v. Charles E. McPherrin et al.

No. 3153.—United States, Appellant, v. F. B. Severs et al.

No. 3154.—United States, Appellant, v. Wilson Bruton et al.

No. 3155.—United States, Appellant, v. Norman Pruitt et al.

No. 3156.—United States, Appellant, v. James Jefferson et al.

No. 3157.—United States, Appellant, v. J. J. Creamer et al.

No. 3158.—United States, Appellant, v. Felix R. Philips et al.

No. 3159.—United States, Appellant, v. J. M. Dickenson et al.

No. 3160.—United States, Appellant, v. James P. Allen et al.

No. 3161.—United States, Appellant, v. Walter F. Nichols et al.

No. 3162.—United States, Appellant, v. John F. McClellan et al.

No. 3163.—United States, Appellant, v. Alfred P. Goat et al.

No. 3265.—United States, Appellant, v. George C. Crump et al.

No. 3276.—United States, Appellant, v. C. J. Benson et al.

No. 3279.—United States, Appellant, v. J. O. Davis et al.

Petition for Re-hearing.

The appellees in each of the above and foregoing causes respectfully petition this court to set aside the order of reversal herein and grant to them and each of them a re-hearing for the following reasons, to-wit:

275 First. This court erred in holding that the Circuit Court of the United States had jurisdiction over the subject matter of controversy involved in the various actions.

Second. This court erred in holding that the United States had capacity to bring and maintain these suits in the Circuit Court of the United States.

Third. This court erred in holding that the United States may bring and maintain these suits to enforce a supposed policy.

Fourth. This court erred in holding that the citizenship conferred upon the members of the Five Civilized Tribes did not destroy the right, if it ever existed, of the United States to bring and maintain suits for the individual property of such citizens without their knowledge or consent and without making them a party to such action.

Fifth. This court erred in holding as follows: "If these Indians may be divested of their lands, they will be thrown back upon the nations, a pauperized, discontented and possibly belligerent people. To prevent such results the United States may invoke the aid of its courts."

Sixth. This court erred in holding that the United States may maintain an action in equity to determine the validity of the conveyances involved, and that such action is not binding upon the owner of the land and would afford no protection to the defendant in this suit in a subsequent proceeding instituted by the allottee.

Seventh. This court erred in determining and establishing a policy for Congress in relation to the allotment of the lands of the Five Civilized Tribes of Indians.

Eighth. That the court, as evidenced by its opinion, wholly misapprehends the conditions existing with reference to the allotment of lands to the members of the Five Civilized Tribes of Indians.

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Argument.

No effort will be made to discuss separately the reasons set forth why the petition for re-hearing herein should be granted; nor is it proposed to cover those grounds specifically covered in the briefs filed on behalf of the various appellees. It is deemed desirable to discuss some of the views promulgated and results declared in the majority opinion and the necessary results that will flow therefrom in an endeavor to establish that the result of the conclusions will be destructive of the principles of equity jurisprudence and impairment of the rights of citizenship, state and national, and an establishment of a control heretofore unheard of the rights privileges and immunities of citizens.

As we interpret the opinion of the court, it is held:

1st. That the allottees of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges and immunities of such citizenship.

2nd. That the United States has neither a legal nor an equitable estate in the lands involved.

3rd. That the jurisdiction of the trial court is sustained upon the ground that the United States may invoke such jurisdiction for the enforcement of its policy.

4th. That if the Indians may be divested of their lands they will be thrown back upon the nation, a discontented, pauperized, and possibly war-like people.

5th. That a violation or disregard of a law of the United States authorizes the maintenance of an action in the name of the United States to enforce its policy to see that its laws are observed.

6th. "That Congress by its own declaration could have placed that question [of jurisdiction or right to maintain suits] beyond controversy and the courts ought not to give a meaning to its acts which would make of them a mere squandering of public funds."

277 7th. That the negative declaration contained in the Act of May 27th, 1908, is equivalent to affirmative legislation.

8th. That the appellees may be required to litigate with the United States all of the questions involved and that the result of such litigation is neither *res judicata*, nor the slightest protection to them in any suit that may be instituted by the allottees upon the same cause of action asserted by the United States.

Jurisdiction Founded Upon Policy.

It is stated in the opinion that to prevent the results therein described United States may invoke the aid of its courts, and "That question was put to rest in the decision of *In re Debbs*, 158 U. S. 564."

It is respectfully submitted that the decision of the Supreme Court of the United States *In re Debbs* affords no precedent for maintaining jurisdiction in the cases at bar. One of the governmental functions of the United States is the transportation of its mails. That function bears no relation whatever to the personal and individual transactions involved in this litigation. The prompt and efficient transportation of the mails is both a duty of the government and a burden assumed by it. Such a duty is imposed by numerous statutes and established by generations of usage. It is a duty to the public, the whole nation—a governmental function. It is not a governmental function to bring a suit against one citizen in favor of another, nor does it bear any resemblance thereto.

But it is said that the possibility of the Indians becoming pauperized and discontented and possibly war-like, affords grounds to invoke the jurisdiction of the court. The parties on whose behalf these suits are brought are citizens and residents of the State of Oklahoma.

278 The burden of caring for these citizens of the State of Oklahoma, if they become pauperized, is upon the state and not upon the nation. If it is a governmental function to pacify the discontented, that function would perhaps rest on the State of Oklahoma and not the national government. The matter of maintaining peace within the boundaries of the State of Oklahoma is with the State of Oklahoma and not with the national government. If a theoretical policy may confer jurisdiction or authorize the maintenance of a suit, is not the State of Oklahoma, under the reasoning of the court, the proper party to maintain these actions?

But it is submitted that the court has fallen into error in not distinguishing between the discharge of a governmental function and intermeddling in controversies between its citizens. It is said that if the government's interest in its measures, meaning, we presume, laws, does not give it a standing in court, then the violation of those measures (laws) must go wholly without redress. No reason is urged to sustain the statement. In a subsequent part of the opinion it is

held that the allottee may bring a suit to accomplish the identical results sought to be accomplished by these suits. May the court indulge in a presumption that he will not do so, and in that event the United States must do so, and because the United States must do so that forsooth the court has jurisdiction? It is not believed that jurisdiction founded upon such grounds can be properly sustained.

It is said in another part of the opinion, "Congress by its own declaration could have placed that question beyond controversy."

* * * Let it be conceded that Congress declined so to do. Is not the very fact that Congress has declined, after its attention has been called to the matter, to place the jurisdiction beyond controversy the very strongest evidence that Congress did not intend the exercise of such jurisdiction?

It is said that the trial court used a dangerous standard of interpretation when it considered what Congress refused to do. Does not the interpretation adopted by this court give much more effect to the non-action of Congress than does the opinion of the trial court? The

United States can invoke jurisdiction of its courts only when
279 authorized by law so to do. No statute has been found authorizing the maintenance of these suits. This court finds public policy a source of jurisdiction, although Congress has not directly or indirectly said so.

It was insisted in the trial court that public policy conferred jurisdiction. The trial court was searching for evidence of that public policy. It was claimed to be found in the action of Congress, but no one was able to point out in what particular action. Might not the trial court properly consider the fact that Congress' attention was called to the assertion of jurisdiction and that it was invited to declare the existence of the same, and that it did not do so, in determining whether or not Congress had conferred such authority? Was not the failure to confer jurisdiction upon request of the department, which asserted its existence, a denial of that request and a denial of the authority asserted? If it was not a denial, was it not a competent matter for consideration in determining the existence of the policy? Is not the opinion of this court in this action based more upon the non-action than upon the affirmative action of Congress? Upon negative declarations rather than upon affirmative declarations? The reasoning of the trial court is criticized for accepting the non-action of Congress as some evidence of the absence of jurisdiction and at the same time a negative declaration is given the force and effect of an affirmative declaration?

This court says "that allottees in the present case do not come within the class of indispensable parties as thus defined. The cause of action set up in the bill is not theirs, but the government's. True, if the government succeeds their title will be cleared of clouds; but if it does not succeed they will be left with their personal causes of action unaffected by what is done in the present litigation. It may be said that this very fact makes the presence of the allottees neces-

sary to complete justice to the defendants. While the measure of justice in their favor would be more complete if the allottees were present, that fact does not render the allottees indispensable parties." This is a novel position. The government has a cause of action and the individual has a cause of action, both based upon one single alleged wrong, and a suit by the government upon this cause of action is not *res judicata* as against the allottee, and we presume upon the same reasoning a suit by the allottee would not be *res judicata* against the government. In other words, the net result is that there is a particular public policy which overturns the law of jurisdiction, the law of *res judicata*, the law with reference to who are indispensable parties, all for the purpose of trying a law suit which accomplishes nothing and binds nobody. The defendants in these law suits may be harassed as long as appropriation may be made, or until final judgment is rendered and if in their favor they have a fruitless victory, which affords them no measure of protection against future litigation of the same kind. It is asserted that court of equity may, and should, lend its aid to an accomplishment of this purpose.

It seems to us unconscionable to permit the prosecution of these suits with the express declaration in advance that a judgment in favor of the defendants would afford them no measure of protection except against the costs of the particular action; that upon the next day thereafter the government may aid and abet an Indian
281 under the provisions of the Act of May 27th, 1908, to institute a suit in his own name for re-trial of the issues here involved, or he may do so on his own initiative, and as many more as he may see fit to lug in. We most earnestly protest that no court has ever before held to a doctrine of this character; that such a doctrine not only means but invites interminable litigation and denies to one party to such litigation any beneficial result whatever that should arise therefrom.

It is earnestly urged that this court erred in reversing the judgment of the trial court, and that the opinion of the trial court and of the circuit judge, dissenting, are correct interpretations of the law and that a rehearing should be granted and the judgment of the trial court affirmed.

Respectfully submitted,

S. T. BLEDSOE,

For the Various Appellees.

I, S. T. Bledsoe, counsel for appellees in the above causes, do hereby certify that the petition for re-hearing is not interposed for delay and that in my opinion the same is well-founded in point of law.

S. T. BLEDSOE,

Counsel for Appellees.

(Endorsed:) Filed Jul- 13, 1910. John D. Jordan, Clerk.

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(Order Denying Petition for Rehearing.)

And on the twentieth day of August, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition of appellees for a rehearing in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term,
1910.

SATURDAY, August 20, 1910.

No. 3152.

THE UNITED STATES OF AMERICA, Appellant,
vs.
CHARLES E. McPHERREN et al.

Appeal from the Circuit Court of the United States for the Eastern
District of Oklahoma.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellees.

On Consideration Whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

August 20, 1910.

(Petition of Certain Appellees for Appeal to Supreme Court U. S.)

And on the thirty-first day of August, A. D. 1910, a petition of certain appellees for an appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the Circuit Court of Appeals, Eighth Circuit.

UNITED STATES, Appellants,
vs.
CHARLES E. McPHERREN et al., Appellees.

283

Petition for Appeal.

J. S. Mullen and W. B. Jansen, appellees in this cause in this court, feeling themselves aggrieved by the order and judgment of reversal made and entered therein on the 8th day of June, 1910, at a day of the 1910 May term of this court, do hereby in open court pray an appeal from said order and judgment to the Supreme Court of the United States for the reasons specified in the assignment of

errors filed herewith; and that a transcript of the record and proceedings upon which said order and judgment is based, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioners further pray that a proper order touching the security to be required of them to perfect this appeal be made.

S. T. BLEDSOE,

Att'ys for J. S. Mullen and W. B. Jansen.

The above appeal allowed in open court, August 31, 1910.

WALTER H. SANBORN,

Presiding Judge.

(Endorsed:) No. 3152. The United States of America, Appellant, vs. Charles E. McPherrin, et al. Petition for Appeal by J. S. Mullen and W. B. Jansen. Filed Aug. 31, 1910. John D. Jordan, Clerk.

(Assignment of Errors on Appeal to Supreme Court U. S.)

And on the thirty-first day of August, A. D. 1910, an assignment of errors on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

3152.

THE UNITED STATES OF AMERICA, Appellant.

vs.

CHARLES E. MCPHERRIN et al., Appellees.

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Assignment of Errors.

J. S. Mullen & W. B. Jansen, appellees in the above entitled cause, respectfully assert and show to the court that in the opinion and judgment of this Honorable Court in the above cause reversing the judgment of the trial court, the following errors were committed to their prejudice:

First. The court erred in holding that the United States had such interest as would authorize a maintenance of this suit in the Circuit Court of the United States.

Second. The court erred in holding that the United States had the capacity to bring and maintain this suit in a Circuit Court of the United States.

Third. The court erred in holding that the Circuit Court of the United States had jurisdiction over the subject matter in controversy involved in this action.

Fourth. The court erred in holding that the conferring of national and state citizenship upon members of the Five Civilized Tribes was not inconsistent with and prohibitive of the right of the United

States to bring and maintain suits for the alleged recovery of or removal of a cloud upon the title of the individual property of such citizens without their knowledge or consent and without making them a party to the suit.

Fifth. That the court erred in not holding that the allottees or heirs on whose behalf this suit is brought were indispensable parties.

Sixth. The court erred in holding that there is a policy of the government of the United States which authorizes the institution and maintenance of this suit.

Seventh. The court erred in holding that a judgment in this action would not be res judicata as against a proceeding instituted by the allottee in his own name to recover the same tract or parcel of land.

285 Eighth. That the court erred in holding as follows: "If these Indians may be divested of their lands, they will be thrown back upon the Nation, a pauperized, discontented, and possibly, a belligerent people. To prevent such results the United States may invoke the aid of its courts."

Ninth. The court erred in reversing the judgment of the trial court without having first determine- the lands sued for were subject to restrictions upon alienation.

Tenth. That the court erred in holding that the bill is not multifarious and that the convenience of the defendants is conserved by joining all in one action.

Eleventh. The court erred in holding that the grant of citizenship, state and national, left the Indian and his property subject to the control of the national government.

Twelfth. The court erred in holding that Congress could enlarge or extend restrictions upon alienation.

Thirteenth. That the court erred in reversing the judgment of the trial court.

Fourteenth. The Court erred in reversing the judgment of the trial court as to this appellee, because the only ground upon which the validity of appellee's conveyance is assailed is that it is in violation of statute prohibiting conveyance by full-blood heirs of inherited lands of members of the Choctaw and Chickasaw Tribes, when there was no such legislation in existence.

Fifteenth. That all of said errors were prejudicial to the rights of the appellees.

They therefore pray that the judgment of the Circuit Court of Appeals be reversed and that the judgment of the trial court be affirmed.

J. R. COTTINGHAM &

S. T. BLEDSOE,

Solicitors for W. B. Jansen & J. S. Mullen,

Appellee in this Court.

(Endorsed:) No. 3152. In the United States Circuit Court of Appeals for the Eighth Circuit. The United States of America, Appellant, vs. Charles E. McPherrin, et al., Appellees. Assignment of Errors. Filed Aug. 31, 1910, John D. Jordan, Clerk.

286 *(Supersedeas Bond of Certain Appellees on Appeal to
 Supreme Court U. S.)*

And on this thirty-first day of August, A. D. 1910, a supersedeas bond of certain appellees on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the Circuit Court of Appeals for the Eighth Circuit.

No. 3152.

UNITED STATES, Appellant,

vs.

CHAS. E. McPHERRIN et al., Appellees.

Supersedeas Bond on Appeal.

Know all men by these presents: That we, W. B. Janssen & J. S. Mullen, as principal & Southern Surety Co. as surety, are held and firmly bound unto the United States of America in the full and just sum of Ten Thousand Dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, jointly and severally by these presents.

Sealed with our seals and dated this the 31 day of August, in the year of our Lord, One Thousand Nine Hundred and Ten.

Whereas, lately, at the May 1910 term of said Court, in a suit pending therein on appeal from the Circuit Court of the United States for the Eastern District of Oklahoma, between the United States, Appellant, and Chas. E. McPherrin, et al., Appellees, the judgment of the trial court was reversed, and,

Whereas, the said J. S. Mullen & W. B. Janssen has prayed for and obtained in open court an appeal, from said judgment of reversal, to the Supreme Court of the United States in the aforesaid suit.

Now, the condition of this obligation is such that if the said J. S.

287 Mullen & W. B. Jansen shall prosecute said appeal to effect
and answer all damages and costs if he fail to make good his
plea, then the above obligation to be void, otherwise to remain in full force and effect.

J. S. MULLEN,

W. B. JANSSEN,

By S. T. BLEDSOE, *Att'y.*

SOUTHERN SURETY COMPANY,

By E. G. DAVIS, *Secretary.*

[SEAL.]

Sealed and delivered in the presence of:

Witnesses:

F. A. UNGLES.

(Endorsed:) No. 3152. United States, Appellant, vs. Chas. E. McPherrin, et al., Appellees. Supersedeas Bond of Appellees J. S. Mullen & W. B. Jansen. The security furnished by the within bond is hereby approved to work a supersedeas, this 31st day of August, 1910. Walter H. Sanborn, Willis Van Devanter. Filed Aug. 31, 1910. John D. Jordan, Clerk.

(Order Approving Supersedeas Bond of Certain Appellees on Appeal to Supreme Court U. S.)

And on the thirty-first day of August, A. D. 1910, an order approving supersedeas bond of certain appellees on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the Circuit Court of Appeals for the Eighth Circuit.

UNITED STATES, Appellant,

vs.

CHARLES E. McPHERREN et al., Appellees.

Order Approving Supersedeas Bond.

On this the 31 day of August, 1910, being a day of the regular May, 1910, term of this court, the appellees, J. S. Mullen & W. B. Jansen, present to this court for approval a supersedeas bond, pursuant to the order of court heretofore made in this cause, and the court, after examining the said supersedeas bond and finding
288 that the same complies with the order, doth approve said bond and order the clerk to spread the approval thereof upon the record and further proceedings in said cause are, as to the said J. S. Mullen, W. B. Jansen, superseded pending said appeal.

WALTER H. SANBORN.

WILLIS VAN DEVANTER.

(Endorsed:) No. 3152. In the Circuit Court of Appeals for the Eighth Circuit. United States, Appellant, vs. Charles E. McPherrin et al., Appellees. Order approving Supersedeas Bond. Filed Aug. 31, 1910. John D. Jordan, Clerk.

(Order Allowing Appeal to J. S. Mullen and W. B. Jansen to Supreme Court U. S.)

And on the thirty-first day of August, A. D. 1910, an order allowing an appeal to J. S. Mullen and W. B. Jansen to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the Circuit Court of Appeals, Eighth Circuit.

UNITED STATES, Appellants,

v.

CHARLES E. MCPHERREN et al., Appellees.

Order Allowing Appeal.

On this the 31st day of August, 1910, the same being a day of the regular 1910 May term of this court, the prayer of J. S. Mullen and W. B. Jansen, appellees in this cause in this court, for an appeal from the order and judgment of reversal herein to the Supreme Court of the United States, and for an order fixing the security to be required of him to perfect his appeal. After hearing the same and being duly advised in the premises.

It is hereby ordered that the appeal as prayed for be granted and that the said appellees, J. S. Mullen and W. B. Jansen, be required to execute an appeal bond in the sum of Ten Thousand (\$10,000.00)

Dollars, to answer for all damages and costs if he shall fail
289 to make good his plea, with sureties to be approved by this court, said bond to operate as a supersedeas bond.

WALTER H. SANBORN.

WILLIS VAN DEVANTER.

(Endorsed:) No. 3152. The United States of America, Appellant, vs. Charles E. McPherrin, et al. Order allowing appeal to J. S. Mullen and W. B. Jansen. Filed Aug. 31, 1910, John D. Jordan, Clerk.

290 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript, pages 1 to 289, inclusive, contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals, in a certain cause in said Court wherein The United States of America is Appellant and Charles E. McPherrin, et al., are Appellees, No. 3152, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this nineteenth day of September, A. D. 1910.

[Seal United States Circuit Court of Appeals,
Eighth Circuit.]

JOHN D. JORDAN.

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

291 In the Supreme Court of the United States.

No. —.

MULLEN and JANSEN, Appellants,
vs.
UNITED STATES.

Stipulation for the Omission of Certain Immaterial Parts of the Record and Printing of Material Parts Only.

It is hereby stipulated by and between Solicitors for the respective parties to the above entitled cause that the Clerk of this Court prepare and cause to be printed the papers and all endorsements thereon hereinafter stated, and all recitals in reference thereto, omitting all other parts of said transcript. That part of the said transcript to be printed being as follows:

1. The Entire Bill in Equity, excepting therefrom all of the following numbered pages of said Bill as the same appears in the original typewritten transcript on file with the Clerk:

13 to 16 both inclusive;

18 to 24 both inclusive;

27 to 74 both inclusive;

292 76 to 98, both inclusive.

100 to 127, both inclusive.

It is the intention of the parties to leave to be printed as part of the Bill, the following pages thereof, covering the following conveyances;

Page 17, Hettie Ishtamahobbe to William B. Jansen;

Page- 25-6 Susan Bond and Eliza Lewis to J. S. and L. V. Mullen;

Page 75, Culverson Thompson to J. S. and L. V. Mullen;

Page 99, Achafullubbee Ward, Sealy Ward and Morris Ward to Joseph S. and L. V. Mullen.

2. Demurrers of J. S. Mullen (page- 142-43, transcript) and W. B. Jansen (pages 154, 5 and 6, transcript).

3. Order and decree of Judge Ralph W. Campbell, sustaining demurrers and dismissing Bill (225).

4. Opinion of Judge Ralph E. Campbell on sustaining demurrers to Bill (183).

5. Petition for an order allowing appeal of the United States of America, dismissing the Bill (228).

6. Assignment of errors filed by United States of America in Circuit Court (231).

7. Order reciting submission of cause to Circuit Court of Appeals (258).

293 8. Opinion of Circuit Court of Appeals and dissenting Opinion of Judge Adams (260).

9. Decree of reversal by Circuit Court of Appeals (273).

10. Petition for rehearing in Circuit Court of Appeals (274).

11. Order denying the Petition for Rehearing by Circuit Court of Appeals (282).

12. Assignment of Errors filed in Circuit Court of Appeals (283).

13. Petition for appeal from the Circuit Court of Appeals to the Supreme Court of the United States by J. S. Mullen and W. B. Jansen, and order allowing same (282).

14. Supersedeas bond and order approving the same (286).

15. Order allowing appeal from the Circuit Court of Appeals to the Supreme Court of the United States (288).

16. Certificate of the Clerk of the Circuit Court to the appeal to the Circuit Court of Appeals (238).

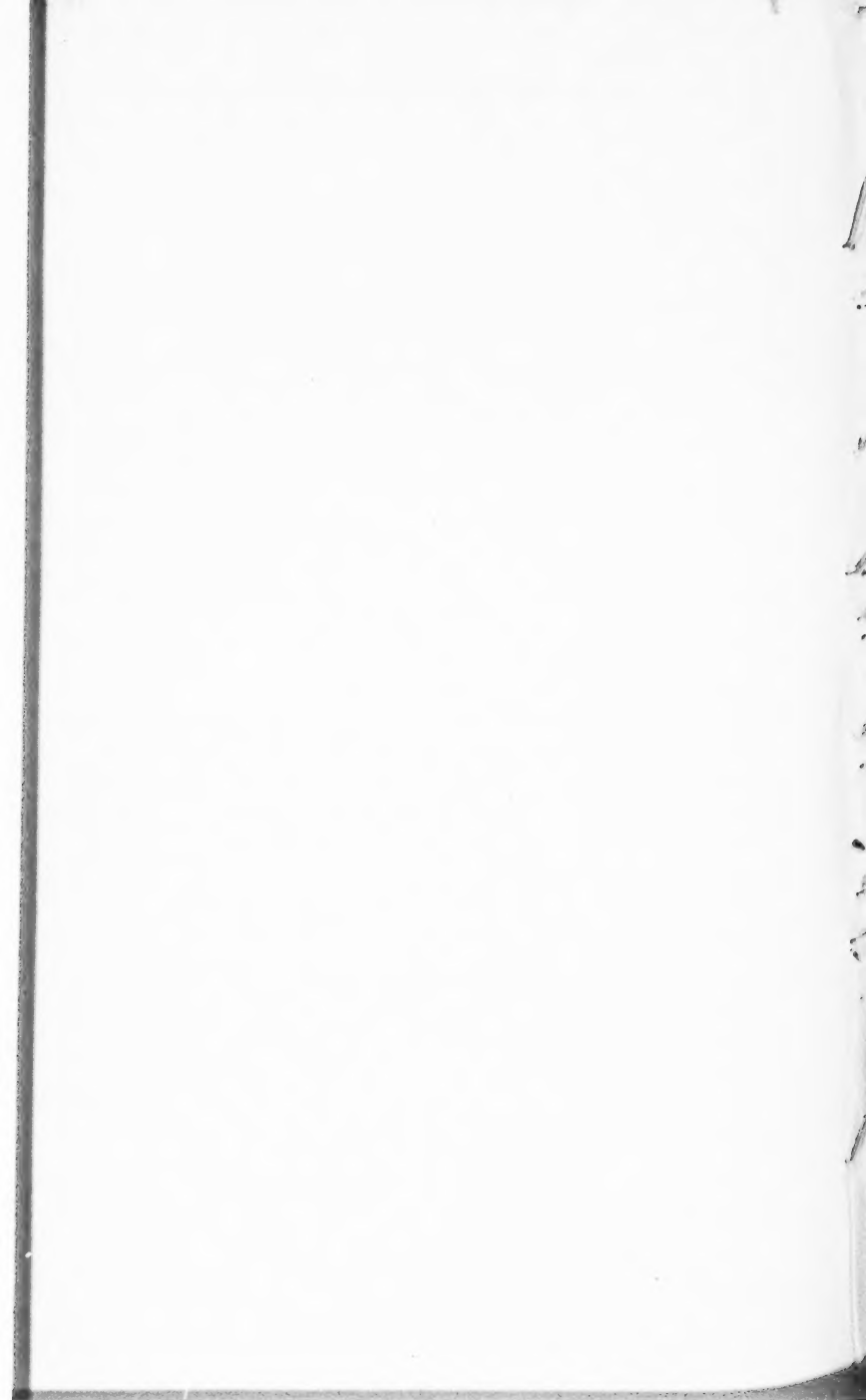
17. Certificate of the Clerk of the Circuit Court of Appeals to the transcript transmitting same to this Court (290).

18. This stipulation for the omission of certain immaterial parts of the record, and for the printing of material parts (291).

S. T. BLEDSOE,
Solicitors for Appellant.
F. W. LEHMANN,
Solicitor General for Appellee.

294 [Endorsed:] File No. 22,333. Supreme Court U. S. October Term, 1910. Term No. 712. J. S. Mullen et al., appellants, vs. The United States. Stipulation to omit parts of record in printing. Filed February 27, 1911.

Endorsed on cover: File No. 22,333. U. S. Circuit Court Appeals, 8th Circuit. Term No. 712. J. S. Mullen and W. B. Jansen, appellants, vs. The United States. Filed October 3d, 1910. File No. 22,333.



In the Supreme Court of the United States.

OCTOBER TERM, 1910.

J. S. MULLEN AND W. B. JANSEN, APPEL-	}	No. 712.
lants,		
v.		
THE UNITED STATES.		

ALFRED F. GOAT ET AL., APPELLANTS,	}	No. 713.
v.		
THE UNITED STATES.		

THE DEMING INVESTMENT COMPANY, AP-	}	No. 781.
pellant,		
v.		
THE UNITED STATES.		

P. E. HECKMAN AND ROBERT L. OWEN,	}	No. 881.
appellants,		
v.		
THE UNITED STATES.		

MOTION TO ADVANCE.

The Solicitor General respectfully moves the court to advance the above-entitled cases on the docket and set them down for hearing together on such date

during the present term as may be convenient to the court.

These were suits brought by the United States in the United States Circuit Court for the Eastern District of Oklahoma against the respective appellants and other persons to cancel certain instruments of writing purporting to be conveyances of lands executed by allottees of the Choctaw, Cherokee, and Seminole Tribes of Indians. The lands covered by such purported conveyances are the allotments made to the said members of the said tribes under agreements between the United States and the said tribes and under the laws of the United States. By such agreements and laws the said allotments were to be inalienable for certain periods of time. As to duration, these periods differ in the case of each tribe and they also differ as to certain classes of Indians within each tribe, dependent largely upon the quantum of Indian blood in the allottee. These purported conveyances were made, the Government contends, during such periods of inalienability.

The United States filed bills of complaint as sole party plaintiff and named in each bill a large number of defendants holding separate deeds to separate and distinct tracts of land and with no community of interest in the various properties involved, but against whom the Government had causes of action identical in character because all of the defendants in a given suit had taken deeds of conveyance from the same class of Indians of the same tribe.

Demurrers were filed in all the cases and as grounds thereof, among others, it was contended—

(a) That the United States is not a proper party plaintiff;

(b) That the allottee is in any event a necessary party;

(c) That the bills are multifarious in that they join a number of persons as defendants having no community of interest in the property involved.

The demurrers were sustained by the Circuit Court on all three of the grounds above specified and the bills dismissed. The Government prosecuted appeals to the Circuit Court of Appeals for the Eighth Circuit and that court reversed the trial court on all three grounds, and ordered that the case be remanded to the Circuit Court with instructions for further proceedings in conformity with the views expressed in its opinion. (*U. S. v. Allen et al.*, 179 Fed. Rep., 13.) It is presumed that the defendants now appeal to this court from that order under section 3 of the act of June 25, 1910 (Stats., 61 Cong., 2d sess., pt. 1, 836, 837), which provides:

That an appeal to the Supreme Court of the United States in all suits affecting the allotted lands within the eastern district of Oklahoma or on demurrers in such suits appealed to the United States Circuit Court of Appeals, Eighth Circuit, is hereby authorized to be made by any of the parties thereto, including appeals from orders reversing judgments of the trial court.

At the time the Government filed its bills in the above-entitled cases it filed 297 other bills of the same general character, involving, in addition to allotments of the Choctaw, Cherokee, and Seminole Indians, allotments belonging to Chickasaw and Creek Indians. The whole litigation involves about 25,000 deeds which, the Government contends, have been taken in contravention of the said agreements and laws, and these deeds it seeks to cancel and remove as clouds upon the titles of the allottees. Thirteen of these cases are pending in the Circuit Court of Appeals for the Eighth Circuit (having been heard and determined with those above entitled), and 284 are pending in the Circuit Court for the Eastern District of Oklahoma, all awaiting the decision of the Supreme Court in the cases now before it.

These 301 suits were filed in July of 1908. The decision of the trial court was rendered on August 6, 1909, and that of the appellate court on June 8, 1910. It will thus be seen that for nearly three years these 25,000 titles, involving a vast area (estimated to be from four to five million acres), have been in litigation.

Moreover, the cases involve questions of general public interest and importance in the administration by the Government of the affairs and property of the 300,000 Indians within the borders of the United States.

In view of the great importance of these questions to the Government, the Indians, the people of the new State of Oklahoma, and the general public,

the necessity for a speedy hearing in this court can not be too strongly urged.

Notice of this motion has been served on opposing counsel.

FREDERICK W. LEHMANN,
Solicitor General.

MARCH, 1911.

○



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 404.

J. S. MULLEN AND W. B. JANSEN, APPELLANTS,

vs.

THE UNITED STATES.

No. 434.

THE DEMING INVESTMENT COMPANY, APPELLANT,

vs.

THE UNITED STATES.

No. 496.

P. E. HECKMAN AND ROBERT L. OWEN, APPELLANTS,

vs.

THE UNITED STATES.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF APPELLANTS.

Counsel for the United States frankly admit that the members of the Five Civilized Tribes are citizens of the United States, and prior to alienation of the lands involved held the

same in fee simple. It is insisted by counsel for the United States, however, that the right to alienate said lands was prohibited (the prohibition being in the form of a restriction on alienation) from making the conveyances complained of.

It is also insisted on behalf of the appellee that there remains some well-defined unperformed obligation on the part of the United States to institute and maintain suits for the purpose of cancelling supposed illegal and invalid conveyances of allotted and inherited lands. We say that it is assumed that such an obligation exists because we are of the opinion that it is a mere assumption without foundation in fact. The various allotment agreements were made as substitutes and as superseding all previous treaties and agreements between the United States and the several tribes. These allotment agreements were entered into after long deliberation and careful consideration. It is respectfully insisted that the Government of the United States owes no duty and assumed no obligation for which specific warrant cannot be found in these agreements. Each and every one of these agreements was made with a view of allotment in severalty of the tribal lands, the dissolution of the tribal governments, the preparation of the domain of these tribes for statehood, and the exercise by the former members of the tribe of the privileges, and the assumption of the responsibilities, incident to State and Federal citizenship.

Notwithstanding all of the obligations of the United States have been reduced to writing, and evidenced by legislative enactments, no reference is made by counsel for the United States to any provision of any of said agreements whereby the United States, either directly or impliedly, assumed the duties and responsibilities which it is claimed in this action that appellee has bound itself to discharge.

The discussion is of national policies, delicate trusts, &c. And this notwithstanding that every person of Indian descent, the validity of whose conveyance is assailed, is a full-fledged citizen of the State of Oklahoma, with all the benefits and burdens of such citizenship, and has been specifically

made subject to the laws, civil and criminal, of said State. He owes allegiance to the State of Oklahoma, and receives protection from its laws. He neither owes allegiance to, nor receives protection from, the *former* tribal governments. If any of these tribal governments exists, it is by virtue of a legislative fiction and not by reason of the exercise of even the most limited character of governmental function. (See opinion Judge Campbell, R., p. 32.) Any other litigant than the United States would be expected to point to the particular statute, treaty or agreement by which it became charged with the duties claimed. It would not be sufficient to reply merely that the number of the suits that the plaintiff had filed established a public policy authorizing the maintenance of such suits. We will discuss some of the cases cited and relied upon by counsel for the United States.

United States *vs.* Flournoy Live Stock and Real Estate Ex., 69 Fed. Rep., 886-7:

The first four lines quoted in general brief of the United States, page 24, draws conclusively the distinction between that case and this. That quotation is from 69 Fed., 890, and is as follows:

"The theory of this bill is that the United States is trustee for the Indians and *holds the title to the land in trust for them, and by force of the treaties with them is charged with the performance of certain duties towards them * * *.*" (Italics ours.)

All of the lands involved except a negligible quantity had been allotted under the general allotment act. The lands thus allotted were the lands of the United States, not of the Winnebagos. The United States merely gave to each allottee a statement showing that a certain tract or parcel of land had been allotted to him, and that the United States would hold the same for him in trust for 25 years, and at the expiration of that time would convey the fee discharged of the trust

and free from all encumbrance whatsoever. The effect of this patent is stated by Mr. Justice Harlan, speaking for this court in *United States vs. Rickert*, 188 U. S., 432, in the following language:

"The 'patents' here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda, in writing, designed to show that for a period of twenty-five years the United States would hold the land allotted in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust and free of all charge or incumbrance."

Therefore, the United States was the owner of the legal title to the lands and charged by the specific terms of the agreement with delivering the lands unencumbered at the expiration of the trust period. It is true that an insignificant part of the lands involved was allotted under the Winnebago agreement of 1863. Under this agreement such lands were inalienable, and the allottees were subject to the criminal but not to the civil law of the State. The treaty also specifically provided that said allottees "shall be deemed incapable of making any valid civil contract with any person other than a native member of the tribe without the consent of the President of the United States." It is respectfully submitted that what is known as the Flourney cases furnish no justification for these proceedings.

Departmental Interpretation.

Counsel for the United States seem to lay much stress upon the contention that departmental interpretation of an act of Congress, the language of which is not clear, should be given grave if not controlling consideration (*Brief of United States*, pp. 38 and 39). We admit that uniform and con-

sistent interpretation of a statute by the Department charged with its execution for a long period of time, and especially where rights have accrued thereunder, may be strongly persuasive of its proper construction.

This rule, however, can have no application to that phase of the controversy here involved to which counsel seek to apply it. The question of whether or not a given statute confers jurisdiction upon a circuit or district court of the United States to entertain a particular action is a judicial question and not a matter for departmental interpretation. In such a case, it is therefore respectfully submitted that departmental interpretation carries only the weight of the logic of the reasoning applied. In the particular matter in controversy, in view of the history of the legislation and the fact that the Department sought the enactment of a statute which would give jurisdiction and that the departmental request was denied, would indicate that the first and unbiased departmental interpretation was that jurisdiction did not exist. (See opinion of Judge Campbell, Record, 24 and 25.) If, in the judgment of the department, such jurisdiction existed, why the strenuous effort to have Congress specifically confer the same? It is respectfully submitted that the rule with reference to the language and uniform interpretation of a statute by a Department charged with its execution can have no application to this phase of this controversy.

There is, however, in this case a proper place for the application of this rule, and that is the well-considered opinion of the Assistant Attorney General, Frank L. Campbell, dated January 29, 1907, addressed to the Secretary of the Interior, and holding that the homestead of a full-blood Chickasaw Indian, Robinson Watson, descended free from all restrictions, and that an approval of the conveyance of the full-blood heirs of Robinson Watson by the Secretary of the Interior was not rendered necessary by virtue of section 22 of the act of April 26, 1906 (34 Stats., 137).

The concluding paragraph of the opinion announced that

"no other construction" of the various acts involved "is permissible." This interpretation was duly approved by the Secretary on the same day. This was an interpretation of a statute by the Department charged with its execution. It is true that the land of Watson was apparently allotted to him in his lifetime and not allotted in his name after his death. This interpretation, which has apparently ever since been acquiesced in by the Department is in direct conflict with the contentions made in this case.

The Matter of Parties.

Judge Amidon, speaking for the majority of the Circuit Court of Appeals (Record, page 56), uses the following language:

"The allottees in the present case do not come within the class of indispensable parties as thus defined. *The cause of action set up in the bill is not theirs, but the Government's.*" (The italics are ours.)

It is upon this declaration that the judgment of the Circuit Court of Appeals is founded that the cause of action set forth in the appeal is not the cause of action of the Indian allottee or his heir, but that such cause of action is the especial *right or policy* or intangible, indescribable thing which constitutes a cause of action on behalf of the United States and confers jurisdiction upon the courts of the United States to enforce the same. This basic principle, which seems to be the sole foundation stone of the opinion of Judge Amidon, speaking for the majority of the Circuit Court of Appeals, is wholly and completely destroyed by the decision of this court in the case of *Tiger vs. Western Investment Co.*, 220 U. S., 286. Marchie Tiger, a full-blood Creek Indian, by divers conveyances made in July and August, 1907, conveyed certain lands inherited by him from his relatives, who were also full-blood Creek Indians, such lands having been

allotted to said relatives. Notwithstanding these conveyances, Marchie Tiger, through his own counsel and in his own name, instituted a suit to recover the land so conveyed and have the conveyances adjudged illegal and void upon the sole and only ground that they were made in violation of the act of Congress of April 26, 1906, 34 Stat., 137. The judgment of the trial court and of the Supreme Court of the State of Oklahoma was that the Secretary's approval was not necessary; that the conveyances were valid, and that Marchie Tiger was not entitled to recover. An appeal was prosecuted to this court by Marchie Tiger in his own name, in his own proper person, and by his own counsel. On the hearing of the case the United States asked leave to file a brief and be heard in oral argument. This leave was granted. Counsel for other parties also asked leave and were granted permission to file briefs *amicus curiae*. The United States in the brief filed in that cause did not challenge the right of Marchie Tiger to maintain the action in his own name and through his own proper counsel, nor did the United States insist that the cause of action involved was its cause of action, as it is doing in the cases at bar. This court has therefore finally and conclusively determined that the heir of an allottee may prosecute in his own name as his own cause of action to final judgment a claim that his conveyances of his inherited lands is void because made in violation of the act of April 26, 1906. The United States was not a party to this action. Had this court affirmed the judgment of the Supreme Court of the State of Oklahoma under the Government's theory, the entire proceeding would have been of no effect as against the United States, and the United States might have instituted and maintained another separate and independent proceeding upon the same cause of action, because under the opinion of the majority of the Circuit Court of Appeals the cause of action was never Marchie Tiger's cause of action, but was always the cause of action of the United States. Can it be said that a party whom this court has specifically held is entitled to prosecute to final judgment the particular cause of

action here involved is not both a necessary and indispensable party to these proceedings?

Rainbow vs. Young, 161 Fed., 835:

The facts involved in this case are as follows: The United States owned 400 acres of land upon which it maintained an Indian training school and agency for the benefit of the members of the Winnebago tribe. Allotment had been made to some of the members of this tribe of adjacent lands under the act of February 8, 1887 (§ 119, 21 Stats., 588). The Department promulgated rules prohibiting the collection of money from members of the tribe to whom the disbursements were made at the agency upon the 400 acres owned by the United States and reserved for the purpose above mentioned. Sloan, as attorney, undertook to make collection at the agency on the land belonging to the United States from certain allottees as payments were made to them. He was removed from the agency by Rainbow, an Indian police. Rainbow was arrested upon a warrant issued by the county judge of Thurston county, charged with an assault upon Sloan. Rainbow made application for discharge by writ of *habeas corpus*. The trial court was of the opinion that the Department was without authority to make the regulation referred to, and denied the writ. The Circuit Court of Appeals in the opinion by the circuit judge (now Mr. Justice Van Devanter) reversed the action of the trial court. The basis of this decision is found in the following paragraph of the opinion:

"Besides, the reservation from which Mr. Sloan was removed is the property of the United States, is set apart and used as a tribal reservation, and in respect of it the United States has the rights of an individual proprietor (see *Commonwealth vs. Clark*, 2 Metc. (Mass.), 23; *Commonwealth vs. Dougherty*, 107 Mass., 243; *Low vs. Elwell*, 121 Mass., 309; 23 Am. Rep., 272; *Fossbinder vs. Svitk*, 16 Neb., 499; 20 N. W., 8661; *Harshman vs. Rose*, 50 Neb., 113;

69 N. W., 755), and can maintain its possession and deal with intruders in like manner as can an individual in respect of his property (*Camfield vs. U. S.*, 167 U. S., 518, 524; 17 Sup. Ct. Rep., 864; 42 Law Ed., 260; *Jourdan vs. Barrett*, 4 How., 168, 185; 11 L. Ed., 924; *Stephenson vs. Little*, 10 Mich., 433)."

It will be observed that the land involved was the property of the United States and that it maintained thereon an agency and training school. It had both the right of a proprietor and of a sovereign as to this particular property. We respectfully submit that this case is in no sense typical of the controversy here involved.

In re Debs, 115 U. S., 564:

We believe that the first four lines of the quotation from the opinion in this case, as the same appears in complainant's brief, page 18, presents the real ground upon which that cause was decided. These lines are as follows:

"Every Government entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other." * * *

Debs and others had interfered with the Federal Government in the discharge of a Government function, the transportation of the mails. It was an interference with this function that was enjoined.

In the Matter of Heff, 197 U. S., 488:

The following quotation from this case appears on page 21 of the general brief on behalf of the United States:

"Undoubtedly an allottee can enforce his right to an interest to the tribal or other property (for that right is expressly granted) and equally clear is it that Congress may enforce and protect any condition

which it attaches to any of its grants. This it may do by appropriate proceedings in either a national or a State court."

The language of the opinion, "and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants," if made applicable herein would have to be changed so as to read "that any of the departments may, without authority from Congress, enforce " and protect any condition which Congress has caused to " be attached to its grants."

It is respectfully submitted that the bill in this case attempts to follow the language of the bills in the Flournoy cases. In the Flournoy cases there was ownership of legal title in the United States, and a specific obligation to deliver these lands unencumbered to the allottees at the expiration of the trust period. It was this specific obligation which it was alleged in the Flournoy cases that constituted a high and delicate trust. In that case the complainant pointed out the specific obligation assumed by the United States. In these proceedings there is a total failure to do so. The conditions are in no wise similar, and the conclusion reached in the Flournoy cases affords no justification for these proceedings.

Now, as to the Alienability of the Lands.

The brief filed by the United States in case No. 404 *Mullen and Jansen, appellants, vs. United States*, upon the special question of the alienability of the lands, quotes and relies only upon those cases in which the statutes involved were wholly different from those in the case at bar. While there may be some similarity in some of the provisions of these treaties, when considered as a whole the interpretation of one throws little or no light upon the proper meaning of the other.

There is no discussion in this special brief of section 12

of the act of July 1, 1902 (32 Stats., 621), which provides that the homestead of an allottee in the Chickasaw and Choctaw nations "shall be inalienable during the lifetime of the allottee not exceeding twenty-one years from date of certificate of allotment." Notwithstanding the Department has itself uniformly held that the homestead descended free from restrictions upon alienation, and without mentioning the same it is contended on page 25 of this special brief that the act of April 26, 1906, continued restriction upon alienation and controls this case. If we correctly interpret the decision in *Tiger vs. Western Investment Company* (221 U. S., 286), it decided only that Congress might extend existing restrictions upon alienation. We do not understand that this case decided that after all restrictions had expired and after the allottee or his heirs had been subjected to the laws of the State of Oklahoma—in other words, after the guardianship had been completely abandoned by Congress, that it could be resumed at will. Besides, it appears that conveyances here involved were made before the passage of the act of April 26, 1906. How this court may be expected to determine the validity of these conveyances under that act is not suggested. It is, however, invited to do so.

Quotation is made from recent opinion of Judge Campbell in *United States vs. Dowden* (page 21 of special brief in case No. 404). This opinion is memorandum only, and does not specifically say on its face that it was dealing only with the surplus lands. We wired the clerk of the court in reference to this phase of the matter, and he advised us that only lands allotted in excess of the homestead, or surplus lands, were involved. This only shows that Judge Campbell differed from the Supreme Court in holding that the alienability of the inherited lands should be determined as to the Chickasaw and Choctaw allottees in accordance with sections 12 to 16 inclusive, and not under section 22. Judge Campbell repudiated the contentions made by the United States attorney there and reiterated here, that specific authority must be found for alienation of the lands before they

are alienable. We quote as follows from his opinion in that particular:

"Of course as to whether the interest in the land conveyed by the allotment certificate was alienable depends upon whether these heirs as to this land came within some of the provisions of law imposing restrictions upon alienation. Under the treaty and grant by which these tribal lands were originally vested in the Choctaw and Chickasaw nations, the tribes could not alienate them without the consent of the United States, and it is contended by counsel for complainant that these restrictions upon alienation followed the land into the hands of the individual allottees, and that even if it does not appear as to any particular land that Congress in providing for the allotment to the individual members of the tribes imposed restrictions upon its alienation, still it cannot be alienated by such allottees without the consent of the United States, unless such right of alienation affirmatively appears in the acts of Congress. To this I cannot agree. The Commission to the Five Civilized Tribes was created and empowered to negotiate an extinguishment of the tribal title to these lands and an allotment thereof to the members of the tribes in severalty. *Wallace vs. Adams, supra*. The restrictions upon the alienation which attached to the tribal title must be held to have ceased with the extinguishment of that title. *Doe vs. Wilson*, 23 How., 457."

It is respectfully submitted that the judgment of the trial court was right, the judgment of the Circuit Court of Appeals wrong, and its judgment should be reversed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1911.

J. S. MURPHY AND W. H. JAMES,
Appellants,

VS.

UNITED STATES,
Appellee.

BRIEF FOR APPELLANTS.

In the

Supreme Court of the United States

October Term, 1911.

J. S. MULLEN AND W. B. JANSEN,
Appellants,

VS.

UNITED STATES,
Appellee.

STATEMENT.

On the 14th day of July, 1908, the United States filed its bill in the Circuit Court of the United States for the Eastern District of Oklahoma, styled "*United States of America v. C. E. McPherron et al.*" to have canceled, set aside and held for naught numerous conveyances of lands inherited from allottees of the Choctaw and Chickasaw Nations, upon the sole ground that such conveyances were made in violation of allotment agreements and laws imposing restrictions upon alienation.

The bill did not charge, nor was it contended, that there was any fraud, deception, duress, inadequacy of consideration, or other actionable wrong. (R., pp. 2-13.)

Persons to the number of one hundred and three were made parties defendant (R., p. 13), but the grantors, who

were heirs of the various Indian allottees, were not made parties either plaintiff or defendant.

To this bill various demurrers were interposed.

The objections to the sufficiency of the bill as set forth in the demurrers may be summarized as follows:

That the complainant has no capacity to maintain said suit.

That the bill of complaint is wholly without equity.

That there is a defect of parties.

That there is a misjoinder of alleged causes of action.

That the bill is multifarious.

That the bill discloses that the defendants are in possession and for that reason, there is a full and adequate remedy at law. (R. 14.)

The cases were submitted to the trial court upon the bill and demurrers, and on the 6th day of August, 1909, Honorable Ralph E. Campbell, District Judge, filed an opinion sustaining the demurrers to the bill. (R., pp. 17 to 41.) Pursuant thereto on the 13th day of September, 1909, a decree was entered dismissing the bill. (R., pp. 41-2.) This decree summarizes in terse language, the grounds for holding that the bill did not state a cause of action. It is as follows:

"On this thirteenth day of September, 1909, on consideration of the demurrers to this bill filed by the various defendants herein, which were heretofore argued and submitted and by the court taken under advisement, the court now finds that the complainant has not such an interest in the matters involved in this cause as entitled it to maintain this action, that the various allottees and patentees of the lands involved in this action are necessary parties thereto, and that there is, therefore, a defect of parties; and that the bill is multifarious.

It is the judgment of the court that for the foregoing reasons the demurrers should be sustained.

It is therefore ordered, that the demurrers herein now being considered be sustained, and the bill dismissed at the complainant's costs."

From the decree of dismissal, the United States prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit.

This cause, together with sixteen others, was submitted to the United States Circuit Court of Appeals on the 9th day of December, 1909. (R. 47-48.) That court on the 8th day of June, 1910, filed an opinion reversing the judgment of the Circuit Court for the Eastern District of Oklahoma, and remanded the cause to the trial court for further proceedings. (R. 48-56.) Circuit Judge Adams filed a dissenting opinion sustaining the action of the trial court. (R. 57 to 60.)

In the meantime Congress apparently realizing the importance of the question involved enacted a law which authorized an appeal from the judgment of the Circuit Court of Appeals direct to this Court from such judgment of reversal. The provision allowing such an appeal is found in Section 3 of an Act entitled: "An Act to Authorize the Secretary of the Interior to issue a patent to the City of Anadarko, State of Oklahoma, for a tract of land, and for other purposes." (Stats. 61 Congress, 2nd Sess. pt. 1, pp. 836-7, Chap. 408.) Said section is as follows:

"That an appeal to the Supreme Court of the United States in all suits affecting the allotted lands within the Eastern District of Oklahoma or on demurrers in such suits appealed to the United States Circuit Court of Appeals, Eighth Circuit, is hereby authorized to be made by any of the parties thereto, including appeals from orders reversing judgments of the trial court."

Petition for rehearing was filed in the Circuit Court of Appeals on the 13th day of July, 1910, and was denied August 20, 1910. (R. 66.)

Pursuant to the Act of Congress allowing an appeal in said cause, the appellants Mullen and Jansen presented to the Circuit Court of Appeals on the 31st day of August, 1910, in open court and at the term, their petition praying an

appeal to this Court, together with their assignment of errors. (R. 66-7.) The appeal was duly allowed (R. 71), supersedeas bond presented and approved (R. 70), and the transcript duly lodged in this Court.

This case, therefore, is before this Court upon its merits upon all of the issues made by the bill and demurrers.

The Circuit Court of the United States for the Eastern District of Oklahoma dismissed the appeal without passing upon the question of whether or not the conveyances assailed were valid. The Circuit Court of Appeals reversed the judgment of the trial court and remanded the cause without determining whether the grantors in the deeds assailed were prohibited from alienating said lands at the time they were conveyed.

The question of whether the lands involved were subject to restrictions upon alienation at the time they were conveyed will be considered in the closing chapter of this Brief. We do not see how it is possible to sustain the order of reversal, unless this Court shall first determine that the lands were not alienable by the grantors at the time the conveyances were made.

There are fifteen errors assigned to the action of the Circuit Court of Appeals in reversing the judgment. The chief matters in controversy are:

First. The right of the United States to maintain the bill in any event, and without regard to whether the conveyances assailed are void.

Second. The validity of the conveyances assailed.

The matter can be more intelligently presented upon these two questions without undertaking to follow, in detail, the assignments of error.

We will consider first the right of the United States to maintain this suit, together with the incidental and subsidiary questions arising upon the sufficiency of the bill in its present form; and, second, the question of whether the lands conveyed by the deeds sought to be canceled were alienable at the time the conveyances were made.

The right of the United States to maintain the bill in the trial court and in the Circuit Court of Appeals was rested on the following propositions:

First. The supposed property interest of the United States in the lands involved, arising from the restrictions imposed upon alienation by the allotment agreement and laws enacted subsequent thereto.

Second. Upon the supposed guardianship of the United States over the persons of the various members of the Five Civilized Tribes.

Third. Upon a supposed public policy.

Fourth. Upon the provisions of the Act of May 27, 1908 (35 Stat. 312).

The trial court denied the contentions of the plaintiff, based upon each and every one of these contentions. As we interpret the decision of the Circuit Court of Appeals, it denied the contentions as based upon the first and second grounds above set out; sustained the same upon the third, and concluded that the fourth lent some support to the conclusions arrived at with reference to the third.

We shall insist in this Brief:

First. That the United States have no property interest whatever in the lands involved.

Second. That the members of the Five Civilized Tribes are citizens of the United States and of the State of Oklahoma; are not wards of the Government of the United States or of any other government; that only the allottees themselves may maintain suits to cancel conveyances covering their individual allotments; that there is a defect of parties, and that the bill is multifarious.

Third. That there exists no such public policy as declared by the Circuit Court of Appeals, and if such policy did exist, it could not operate to confer jurisdiction to entertain a suit at the instance of the United States to cancel the conveyances complained of.

Fourth. That the Act of May 27th, 1908, did not authorize the bringing or maintenance of this suit.

Fifth. That the lands here involved were allotted under Section 22 of the Choctaw-Chickasaw Supplemental Agreement in the name of a deceased member of the Tribe and descended to his heirs free from all restrictions upon alienation.

TREATIES AND STATUTORY PROVISIONS AFFECT- ING THE LANDS OF ALLOTTEES IN THE FIVE CIVILIZED TRIBES.

It is necessary to consider the nature and character of the title of the allottees whose lands are involved. To do this we must consider the Laws and Treaties by which each of the Five Civilized Tribes acquired title to the tribal domain, and also the various allotment agreements and statutory provisions under which the tribal lands were allotted in severalty to the individual members of the Tribes whereby the fee simple title was vested in such members.

1. Tribal Titles.

a. Choctaws and Chickasaws.

On the 8th day of October, 1820 (7 Stat. 210), the United States ceded to the Choctaw Nation the tract of country which subsequently constituted the Choctaw and Chickasaw Nations. The cession is in the following language:

"For and in consideration of the foregoing cession, on the part of the Choctaw Nation, and in part satisfaction for the same, the Commissioners of the United States, in behalf of said States, do hereby cede to said Nation, a tract of country west of the Mississippi River, and bounded as follows:" etc.

On the 27th day of September, 1830, the United States entered into another treaty with the Choctaw Tribe or Nation, by the terms of which they ratified the previous cession. (7 Stat. 333.)

In 1837 the Choctaws and Chickasaws, with the approval of the United States, entered into an agreement, by the terms of which the Chickasaws were to have a district in the Choctaw country and the members of each tribe were to have the same interest in the lands of the other tribe as in that of their own. (11 U. S. Stat. 57.) There is, therefore, no distinction, either as to tribal title or the title of the individual allottee, as between the Choctaws and Chickasaws.

By the treaty of 1855 the United States declared that "And pursuant to an Act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw Tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole; provided, however, no part therein shall ever be sold without the consent of both tribes; and the said lands shall revert to the United States if said Indians and their heirs become extinct, or abandon the same." (11 U. S. Stat. 611.)

In 1866 the United States entered into a new treaty with the Choctaws and Chickasaws confirming the grants made in the treaties of 1830 and 1855. (14 Stat. 769.)

The result of these agreements and the grants therein contained was to pass to the Choctaw and Chickasaw Tribes a fee simple title to the lands described, defeasible only on the happening of the contingency mentioned in the proviso, to-wit: "If the said Indians and their heirs become extinct or abandon the lands so granted." At no time since 1830 have the United States had a greater interest in the lands of the Choctaws and Chickasaws than the mere possibility of a reversion. Such was the nature of the title of these two tribes when the negotiations for the allotment of the lands among the members

thereof were begun; and it was in recognition of this title that the United States deemed it necessary to secure the consent of the tribes to a division of the tribal lands.

b. Creeks.

On the 14th day of February, 1833, the United States entered into a treaty with the Creeks (7 Stat. 417), which was proclaimed the 12th day of April, 1834. Article 3 of this treaty is as follows:

"The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the lands assigned said Nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

Pursuant to this treaty, on the 11th day of August, 1852, the President of the United States executed a patent to the Creek Nation for the lands therein described. The granting clause of which is as follows:

"Now know ye that the United States of America, in consideration of the premises and in conformity with the above recited provisions of the treaty aforesaid, have given and granted and by these presents do give and grant unto the said Muskogee or Creek Tribe of Indians the tract of country above described. To have and to hold the same unto the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them."

It will be observed that the treaty and grant are substantially identical with the treaty with and grant to the Choctaws and Chickasaws.

On August 7, 1856, another treaty was entered into with the Creeks ratifying and confirming the title conveyed by the patent above referred to.

c. Seminoles.

By Article 1 of the Treaty of 1856, between the United States and Creek and Seminole Tribes of Indians - (11 Stat., 699), the Creek Nation by and with the consent of the United States granted, ceded and conveyed to the Seminole Indians a tract of country included within certain described boundaries. The Third Article of the Treaty of 1866, entered into by and between the United States and Seminoles (14 Stat. 755) contained the following grant:

"In consideration of said grant and cession of their lands, estimated at two million, one hundred and sixty-nine thousand and eighty (2,169,080) acres, the United States agree to pay said Seminole Nation the sum of three hundred and twenty-five thousand, three hundred and sixty-two (\$325,362) dollars, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby GRANT to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so GRANTED by the United States to the Seminole Nation are bounded and described as follows, to-wit: Beginning on the Canadian river, where the line dividing the Creek land according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north, to where said line crosses the North Fork of the Canadian river; thence up said North Fork of the Canadian river; thence up said North Fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written." * * * * *

(Kappler, Vol. 2, p. 911).

It will be observed, therefore, that there is no limitation of any character upon the grant made to the Seminoles, nor is there any reversionary interest reserved to the United States. It is simply a clear and distinct grant passing an untrammelled fee simple title.

d. Cherokees.

On the 6th day of May, 1828, the United States entered into an agreement with the Cherokee Nation, Article 2 of which contained the following stipulation:

"The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows:" etc.

Subsequently on the 31st day of December, 1838, a patent was issued to the Cherokee Nation conveying said lands and having the following granting clause: "To have and to hold the same, together with all the rights, privileges and appurtenances thereto belonging to the said Cherokee Nation forever. * * * The lands hereby granted shall revert to the United States if the Cherokee Nation becomes extinct or abandons the same."

Dissensions having arisen among the different bands of the Cherokees, a new treaty was made with the United States on August 6, 1846, by Article 1 of which previous grants were ratified and confirmed in the following language:

"That the United States will forever secure and guarantee to them and their heirs or successors, the country so exchanged to them, and if they prefer the United States will cause a patent or grant to be made to them and executed for same; provided, always, that such land shall revert to the United States if the Indians become extinct or abandon the same." (9 Stat. 871.)

The interest of the United States in the Cherokee domain was, therefore, the possibility of a reversion in the event the Cherokee Nation should become extinct or abandon the lands granted. In each case the possibility of the reversion existing in favor of the United States has been not only rendered impossible, but waived by the United States in the clearest and most forcible language. This waiver is in the form of a consent to the allotment of the lands to the members of the tribe and in the vesting in such members an absolute and unqualified fee simple title to the lands selected and received in allotment.

2. Title of Allottees to Individual Allotments.

a. Choctaws and Chickasaws.

The original allotment agreement entered into between the United States and the Choctaws and Chickasaws, known as the Atoka Agreement, became a law as Section 29 of the Act of June 28, 1898 (30 Stat. 495). Before any of the lands of the Choctaws and Chickasaws had been allotted, a Supplemental Agreement was entered into (32 Stat., 641), which dealt with practically the entire subject of the allotment of lands to the members of the Choctaw and Chickasaw Tribes and freedmen. Under Section 11 of this Supplemental Agreement "There shall be allotted to each member of the Choctaw and Chickasaw Tribes, as soon as practicable after the approval by the Secretary of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval of the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable lands of the Choctaw and Chickasaw Nations." * * *

Sections 66 and 68 of this Agreement are as follows:

(66) "All patents to allotments of land, when executed, shall be recorded in the office of the Commission to the Five Civilized Tribes within said nations in books appropriate for the purpose, until such time as Congress shall make other suitable provision for record of land title as provided in the Atoka Agreement, without expense to the grantee; and such records shall have like effect as other public records.

(68) No Act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations."

b. Creeks.

Section 3 of the original Creek Agreement (31 Stat. 861), provided that "All lands of said Tribe, except as herein provided, shall be allotted among the citizens of the Tribe by said commission, so as to give each an equal share of the whole in value as near as may be." * * *

Section 8 of this Agreement is as follows:

"The Secretary of the Interior shall, through the United States Indian Agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided, and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land."

Section 23 of the same Agreement reads in part as follows:

"Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due

form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed.

Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment."

c. Seminoles.

The lands of the Seminoles were allotted under the provisions of the Seminole Agreement (30 Stat. 567), December 16, 1897, providing for a division of the lands of the Seminoles among the members of that tribe. The principal chief last elected by the tribe was required to execute a patent under his hand and the seal of the Nation, conveying to the allottee all the right, title and interest of the said Nation and the members thereof in the lands so allotted; the secretary is directed to approve such deed, and such approval to operate as a relinquishment of the right, title and interest of the United States to the lands conveyed; and the acceptance by the allottee is to operate as a relinquishment of his interest in the lands of the Tribe other than those selected by him in allotment.

d. Cherokees.

Under the provisions of Section 11 of the Cherokee Agreement (32 Stat., 716):

"There shall be allotted by the commission to the Five Civilized Tribes and to each citizen of the Cherokee Tribe, as soon as practicable after the approval by the

Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements."

Sections 58, 59 and 60, relating to the passing of title to Cherokee allottees, are as follows:

(58) "The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate.

(59) All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent.

(60) Any allottee accepting such patent shall be deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in this act, and to relinquish all his right, title, and interest to the same, except in the proceeds of lands reserved from allotment."

All of the above provisions with reference to the allotment of lands of the various tribes should be considered and construed in the light of the previous legislation looking to allotment.

3. Legislation Affecting All Five of the Tribes.

On the 3d day of March, 1893, the President approved an Act of Congress (27 Stat. 645) authorizing the appointment of commissioners

"to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation, and the Seminole Nation for the purpose of extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same, or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other methods as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within the said Indian Territory."

Section 15 of the same Act is as follows (27 Stat. 645):

(15) "The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual, within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotment the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

Pursuant to the authority conferred upon this commission to enter into agreements with the Five Civilized Tribes for the allotment in severalty of the lands of such tribes, and that "upon the allotment of the lands held by the said tribes,

respectively, the reversionary interest of the United States therein shall be relinquished and shall cease," negotiations were entered into, resulting in the agreements above quoted from.

It took the commission practically five years to secure the first agreement with one of the Civilized Tribes, and nearly ten years to perfect the agreements with all of the tribes. During all of the time, however, it was the same commission acting under the same authority and pursuant to the legislation by which it was originally created and empowered to act.

It will be observed in each instance that the deed or patent is to be executed by the Governor or Principal Chief, and not by the United States. The deed so executed is executed for and on behalf of the nation in its corporate or public capacity. This is a direct recognition of the fact that the title is in the nation, and not in the United States. If the title were in the United States the grant would be by the United States with the assent of the nation. This distinction is clearly sustained by the fact that wherever the Indians occupy a tribal reservation and the same is allotted to members of such tribes, the patent is executed by the United States, and not by the principal chief of the tribe. There is also a further provision that an acceptance by the allottee of the deed shall operate in effect as a consent upon his part to a division of the tribal lands and the relinquishment of any claim to the lands allotted to other members of the tribe.

In the same connection, in the Seminole, Creek and Cherokee Agreements, the approval of the Secretary is to operate as a relinquishment of the interest of the United States in and to the lands so patented to the allottee. The word "relinquishment" in this connection is clearly used in recognition of an existing right and not as a grant of a new and independent interest in the lands patented. The title to the tribal lands being in the nation, in its corporate capacity, there was nothing for the individual, accepting the allotment and patent from the nation, to grant or convey, by the accept-

ance of the patent on his part, nor did the approval of the patent by the Secretary amount to a grant on the part of the United States.

The term in which the word "relinquishment" is used in this connection is correctly interpreted in the case of *United States v. Joseph*, 94 U. S. 614. In that case this Court had under consideration a provision of the Act of Congress of December 27, 1858 (11 Stat. 374), relating to the Pueblo of Taos in the county of Taos, in which the Commissioner of the Land Office was ordered to "issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said surveyor-general, and cause a patent to issue therefor, as in ordinary cases to private individuals, provided, that this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist."

Discussing this provision and the meaning of the word "relinquishment" contained therein, this Court uses the following language:

"It is unnecessary to waste words to prove that this was a recognition of the title previously held by these people, and a disclaimer by the government of any right of present or future interference, except such as would be exercised in the case of a person holding a competent and perfect title in his individual right."

When the members of each of the Five Civilized Tribes select, as required by the provisions referred to, the lands they desire to take in allotment, and that selection is approved, nothing further remains to be done by such members in order to perfect their title to the lands so selected. The issuance of the allotment certificate and patent which follows are mere ministerial acts. It requires neither allotment certificate nor patent to pass title to the allottee. The provision that "there shall be allotted, etc.," contained in the various agreements

is sufficient when the land is selected and designated to pass title to the allottee without the necessity of certificate or patent.

Wallace v. Adams, 143 Fed. 716.
Jones v. Meehan, 175 U. S. 1, 16.
Doe v. Wilson, 23 How. 457.
Quinney v. Denney, 18 Wis. 485.
Crews v. Burcham, 1st Black. 352.
French v. Spencer, 21 How. 228.
Stark v. Starrs, 6 Wal. 402.
Lamb v. Davenport, 18 Wal. 307.
Ryan v. Carter, 93 U. S. 78.
Best v. Polk, 18 Wal. 112.
Oliver v. Forbes, 17 Kan. 113.
Clark v. Lord, 20 Kan. 390.
Francis v. Francis, 99 N. W. 14, 203 U. S. 233.
United States v. Torrey, 154 Fed. 263.
United States v. Moore, 154 Fed. 712.
New York Indians v. United States, 170 U. S. 1.

Restrictions upon alienation do not vest an interest in the United States or limit a fee simple title.

The mere existence of restriction upon alienation imposed for the protection of the allottee vests no interest whatever in the United States in reversion or otherwise. A violation of the statute imposing restrictions upon alienation does not in any event redound to the interest of the United States or impair the title of the allottee.

In *Libby v. Clark*, 118 U. S. 250, 255, the Court said:

"The title conveyed to Hurr by the patent was a *fee simple*; this is, it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. The *restriction* on his right to convey did not deprive the title of the character of a *fee simple estate*. 'An estate in the fee simple is where a man has an estate in lands or tenements to him and his heirs forever.' (4 Com. Dig.,

Estates 1.) The limitation on the power of the sale for five years 'is not inconsistent with the fee simple estate. Such, also, seems to have been the practice of the government in other treaties referred to by counsel in their brief.'

In *Schrimpscher v. Stockton*, 183 U. S. 290, 299, the Court said:

"Here the United States had issued a patent to Rodgers 'and to his heirs and assigns forever,' subject to a condition, not that the title should revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not rebound to the benefit of the United States or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title *should remain in him*, notwithstanding any alienation that he might make."

The whole estate having vested in the allottee, there could be no possible interest remaining in the United States. Not even a possibility of forfeiture or reversion.

The United States own no property interest upon which to maintain this action, nor may the same be maintained for the protection of citizens, generally, against violations of law.

The sole authority of the Circuit Courts of the United States to exercise jurisdiction over causes where the United States are plaintiffs or petitioners, is given by the Act of August 13th, 1888 (25 Stat. 434). This statute was considered and construed by this Court in the cases of

United States v. Sayward, 160 U. S. 493.

United States v. Payne Lumber Company, 206 U. S. 467,

and by the Circuit Court of the United States in *United States v. Auger et al*, 153 Fed. 671, and *United States v. Paine Lumber Company*, 154 Fed. 263.

This Court has also had occasion to construe the provisions of Section 2, Art. III of the Constitution, conferring original jurisdiction upon *this* Court over "all controversies to which the United States may be a party, and to controversies between two or more states," in the cases of:

Louisiana v. Texas, 176 U. S. 1.

New Hampshire v. Louisiana, 108 U. S. 76.

Kansas v. U. S., 204 U. S. 331.

Minnesota v. Hitchcock, 185 U. S. 373.

Oregon v. Hitchcock, 202 U. S. 60.

U. S. v. Texas, 143 U. S. 621.

Oklahoma v. A. T. & S. Fe Ry. Co., 31 Sup. Ct. Rep. 434 (Advance Sheets).

We do not consider it necessary to further pursue this phase of the controversy because both the Circuit Court and the Circuit Court of Appeals found that the United States had no such property interests in the subject matter in controversy as to authorize the invoking of the jurisdiction of the Circuit Court of the United States.

We, however, desire to call the Court's attention to a terse, concise and carefully worded statement as to what interest is necessary in order to permit a sovereignty to maintain a suit, the same being a quotation from the opinion delivered by Justice Harlan for the Court in the case of *State of Oklahoma, complainant, v. The Atchison, Topeka & Santa Fe Railway Company, defendant*, decided the 3rd day of April, 1911, and reported in the 31st Supreme Court Reporter, pp. 434-437 (Advance Sheets). The language is as follows:

"We are of opinion that the words in the Constitution conferring original jurisdiction on this Court in a suit 'in which a state shall be a party' are not to be interpreted as conferring such jurisdiction in every cause

in which the state elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or public policy against wrongdoers generally."

And the following quotation from the opinion of this Court, speaking through Justice Harlan in the case of *State of Oklahoma v. Gulf, Colorado & Santa Fe Railway Company*, decided April 3d, 1911, 31 Supreme Court Reporter, pp. 437-441 (Advance Sheets):

"But there is another ground which is equally fatal to the claim that this Court may give the relief asked by an original suit brought by the State. In the provisions of the Constitution relating to the judicial power of the courts of the United States, it is provided, as we have seen, that 'in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction.' In *Oklahoma v. Atchison, T. & S. F. Ry. Co.*, No. 13, Original, just decided (220 U. S. —; *ante*, 434, 31 Sup. Ct. Rep. 434), it was held that a State could not invoke the original jurisdiction of the court, by suit on its behalf, where the primary purpose of the suit was to protect its citizens generally, against the violation of its laws by the corporations or persons sued; that the above words, 'those in which a state shall be a party,' were not to be so interpreted as to embrace suits of that kind."

Judge Amidon, speaking for the majority of the Circuit Court of Appeals in the case at bar (*United States v. Allen*, 179 Fed. 13), uses the following language:

"Turning now to the objections which were made and sustained by the trial court, has the Federal Government such an interest as entitles it to maintain these suits? It will be considered at the outset that it has no legal or equitable estate in the allotments and if such an estate is necessary, it has no standing in court."

We respectfully submit that in this declaration Judge Amidon was correct. That he is supported in his conclusion that the United States have no property interest by reason of the restrictions upon alienation, see the following decisions of this Court:

Libby v. Clarke, 118 U. S. 250-255.

Schrimscher v. Stockton, 183 U. S. 290-299.

U. S. v. Paine Lumber Company, 206 U. S. 467.

The former members of the Five Civilized Tribes are citizens of the United States and the State of Oklahoma, and not wards of either state or national governments.

The conclusions of the Circuit Court of Appeals, as expressed in the opinion of Judge Amidon, are erroneous largely because based upon a want of appreciation of the difference between the advance in civilization made by the members of the Five Civilized Tribes, as compared with blanket Indians, the nature of their tribal title and the character of the individual title acquired by the allottee.

A most careful examination of the opinion of Judge Amidon discloses that he was acting under the presumption that the members of the Five Civilized Tribes were nomadic blanket Indians, at least semi-barbarous, and more than a century of the public history of this tribe is entirely lost sight of.

As early as 1855, this Court in the case of *Mackey v. Cox*, (18 Howard 100, 102-3) said of the Cherokees:

"The Cherokees are governed by their own laws; as a people they are more advanced in civilization than any of the Indian Tribes, with the exception, perhaps, of the Choctaws. By the national council their laws are enacted, approved by their executive, and carried into effect through an organized judiciary. Under a law 'relative to estates

and administrators,' letters of administration were granted to the persons above named on the estate of Samuel Mackey, deceased, by the Probate Court, with as much regularity and responsibilities as letters of administration are granted by the state courts of the Union. * * * It is refreshing to see the surviving remnants of the races which once inhabited and roamed over this vast country as their hunting grounds, and as the undisputed proprietors of the soil, exchanging their erratic habits for the blessings of civilization."

That the Cherokees continued to progress is evidenced by the Treaty of 1866 (14 Stat. 799) the 13th Article of which declares:

"The judicial tribunals of the Nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country, in which members of the Nation by nativity or adoption shall be the only parties; or where the cause of action shall arise in the Cherokee Nation."

The Constitution of the Cherokees of 1827 is a model of simplicity and of the application of a written Constitution, republican in form, to tribal conditions.

Mehlin v. Ice, 56 Federal 12.

What is above stated with reference to the Cherokees applies with equal force to the Choctaws, Chickasaws and the Creeks, and in a somewhat more limited degree to the Seminoles.

In 1887, when the General Allotment Act became a law (24 Stat. 398-119), the advance made in civilization by the Five Civilized Tribes and the character of their tribal title caused their exemption therefrom.

On March 3, 1893, Congress created a Commission to negotiate with the Five Civilized Tribes for the allotment of their lands in severalty, for the purpose of the ultimate creation of a State or States of the Union, which shall "em-

brace the lands within the said Indian Territory." (27 Stat. 645.) Section 15 of this Act provided that

"Upon such allotment, the individual to whom the same may be allotted shall be deemed to be in all respects citizens of the United States, * * * and, upon the allotment of the lands held by the said Tribes respectively, the reversionary interest of the United States shall be relinquished and shall cease."

Allotment Agreements were made by the various Tribes and approval thereof given by Congress as follows:

Seminole Original Allotment Agreement (30 Stat. 567), Seminole Supplemental Allotment Agreement (31 Stat. 250); Choctaw and Chickasaw Allotment Agreement (30 Stat. 495-505); Supplemental Allotment Agreement (32 Stat. 641); Creek Allotment Agreement (31 Stat. 861); Creek Supplemental Agreement (32 Stat. 500), and Cherokee Allotment Agreement (32 Stat. 716).

The policy of isolation from surrounding country applied to Indians on Indian Reservations was never, in fact, applied to the territory of the Five Civilized Tribes. In 1890 there were 180,182 persons residing in Indian Territory, of whom 51,279 were Indians. In 1900, the population of Indian Territory had increased to 392,000, of which 52,500 were Indians. In 1890 the Indian population, which included a few more Indians than those of the Five Civilized Tribes, constituted 25.5 per cent of the total population and in 1900, 13.4 per cent.

These conditions, and the progress made in securing of Allotment Agreements with the various tribes, caused Congress in 1901 to deem it advisable to confer the full rights of citizenship upon every Indian in the Indian Territory. In 1900 a bill was introduced in the House of Representatives, being House Bill No. 10701, which is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That Section 6 of Chapter 119, U. S. Statutes at Large, page 390, is hereby amended as follows,

to-wit: After the words 'civilized life,' in line 13, in said Section 6, insert the words, 'and every Indian in the Indian Territory.' "

This Act duly passed both branches of Congress and was approved by the President and became a law on the 3d day of March, 1901. (31 Stat. 1447.)

That Congress understood that the purpose of this amendment was to confer full and complete citizenship upon every Indian in the Indian Territory, appears from the language of the Act, and from a debate thereon in the House of Representatives, June 5th, 1900, appearing in Volume 33, Congressional Record 8, page 6760, and from a debate in the House on March 9th, 1906, when the House had under consideration what finally became the Act of May 8th, 1906 (34 Stat. 182-3), and which appears in Congressional Record Vol. 40, No. 4, page 2598, and from a report of the Senate Committee, to whom said bill was referred when it was under consideration, that report being as follows:

"The Committee on Indian Affairs, to whom was referred the bill (H.R. 10701) to amend Section 6, Chapter 119, United States Statutes at Large, No. 24, beg leave to submit the following report and recommend that said bill do pass without amendment.

The statute proposed to be amended provided for granting citizenship to all Indians upon receipt by them of their allotments, but made an exception of the Five Civilized Tribes, who at the time protested, on the ground that they were conducting governments of their own, which would be weakened by such a step. These governments are now completely changed and this reason has disappeared.

Under the operation of the statute referred to the Indians in Oklahoma, such as the Pawnees, the Sac and Foxes, Pottawatomies, Kickapoos, the Cheyennes and Arapahoes, and in the Indian Territory the Quapaws, the Senecas, the Wyandottes, the Ottawas and the Shawnees, and even the Modocs, have all been granted the valuable right of United States citizenship. None of these

Indians are so highly advanced as the Five Civilized Tribes, and none so well prepared to enjoy United States citizenship.

The independent self-government of the Five Civilized Tribes has practically ceased. The policy of the Government to abolish classes in Indian Territory and make a homogeneous population is being rapidly carried out. To enable the Indians of Indian Territory to properly protect their rights they should be given the right of United States citizenship immediately. They should at once be put upon a level and equal footing with the great population with whom they are now intermingled.

There are about 70,000 Indians in Indian Territory, many of whom are already United States citizens. It is doubtful whether, under the statutes, these Indians can perform any of the usual personal business engagements which are taking place daily on a vast scale in Indian Territory without a technical violation of the laws requiring supervision of the Indian people. It is true that these laws are regarded by the people of Indian Territory as not applicable to them. But all questions with regard to this matter should be eliminated by giving to them legal rights equal with other men.

By the terms of the Act 'For the protection of the people of the Indian Territory, and for other purposes,' the members of the Five Civilized Tribes are authorized to bring suits in the United States courts to recover possession of property, they are permitted to vote, and under existing laws they act on juries.

This bill simply extends to the members of the Five Civilized Tribes the same privileges that are enjoyed by other Indians to whom allotments have been made."

This Court may, in arriving at the purpose of Congress in the enactments above referred to, interpret the same in the light of the history of such Acts and existing conditions, and may consider the report of the Senate committee.

Oceanic Navigation Co. v. Stranahan, 214 U. S. 320-333.

The Delaware, 161 U. S. 459.

Buttfield v. Stranahan, 192 U. S. 470.

Sutherland on Statutory Const., 2d Ed., Sec. 470.

In the case of the *Oceanic Navigation Company v. Stranahan*, this Court, speaking through Mr. Justice White, with reference to the consideration of the report of the Senate committee on immigration, uses the following language:

"While we have said that the conclusions just stated are clearly sustained by the text, yet, if ambiguity be conceded, it is dispelled, and the same result is reached, by a consideration of the report of the Senate committee on immigration, where the provisions originated and which we have a right to consider as a guide to its true interpretation."

The purpose of the Act as stated by the Senate committee was to place the Indians of Indian Territory "upon a level and equal footing with the great population with whom they are now intermingling."

Section 6 of the General Allotment Act as amended, the amendment being in italics, is as follows:

"That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, *and every Indian in Indian Territory* is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians

within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

It will be observed that Section 6, as amended, makes every Indian in the Indian Territory a citizen of the United States and confers upon him all the "*rights, privileges and immunities of such citizens.*" (Italics ours.)

The word "all" is used for some purpose. There is no broader term in the English language. The result of so conferring citizenship was declared in *In re Heff* (197 U. S. 488) to be to dissolve the relation of guardian and ward and to endow such Indians with the full rights of citizenship.

We quote from the opinion in that case, speaking with reference to the particular statute here under consideration, as follows:

"We make these references to recent treaties, not with a view of determining the rights created thereby, but simply as illustrative of the proposition that the policy of the Government has changed, and that an effort is being made to relieve some of the Indians from their tutelage and endow them with the full rights of citizenship, thus terminating between them and the United States the relation of guardian and ward. * * *"

The Oklahoma Enabling Act (34 Statutes 267) provides that the

"*inhabitants* of all that part of the area of the United States now constituting the Territory of Oklahoma and of Indian Territory, as at present described, may adopt a Constitution and become the State of Oklahoma, as hereinafter provided. * * *" (Italics ours.)

Section 2 of the Enabling Act provides:

"That all male persons over the age of 21 years who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory or

Oklahoma, and who have resided within the limits of said proposed state for at least six months next preceding election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed state."

These sections made the inhabitants of Oklahoma and Indian Territory, including not only those persons who were then citizens of the United States, but also all members of any Indian tribe residing in either territory, members of the political community and citizens of the new state to be formed from the two territories.

In *Miner v. Happersett*, 21 Wallace 162-167, this Court speaking with reference to citizenship in a state, uses the following language:

"Whoever then was one of the people of these states when the Constitution of the United States was adopted became *ipso facto* a citizen and a member of the state created by its adoption. He was one of the persons associated together to form the nation and was, consequently, one of its original citizens. As to this, there never has been a doubt. Disputes have arisen as to whether or not certain persons, or certain classes of persons, were a part of the people at the time, but never as to their citizenship, if they were."

The provisions of the Oklahoma Constitution made every Indian in the Indian Territory, regardless of his Federal citizenship, "one of the people of the State of Oklahoma," and therefore he "was adopted" and "became *ipso facto* a citizen and member of" the state created thereby. And such is the rule approved and declared by this Court in the case of *Boyd v. Thayer*, 143 U. S. 175, and in *Bolln v. Nebraska*, 176 U. S. 88. At the time of the institution of this suit, therefore, every Indian in the Indian Territory, including every member of the Five Civilized Tribes, was, by authority of the Act of March 3d, 1901, and by authority of the provisions of the Enabling

Act and the Constitution of the State of Oklahoma, a citizen of the United States and of said state, with all of the rights, privileges and immunities of such, and became subject to the laws of the State of Oklahoma. Congress, therefore, having conferred upon the members of the Five Civilized Tribes citizenship in the United States, with all of the rights, privileges and immunities thereof, and having constituted such members of said tribes (with the consent of the people of the state as conditioned in the Constitution thereof) citizens of the State of Oklahoma, and having subjected them to the laws of said state, civil and criminal, they were in the specific condition referred to by this Court in *In the Matter of Heff* (197 U. S. 499-508) and described in the following language:

"We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the state, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and incumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

And that such was the result of this legislation was adjudged by the trial court in this cause (*U. S. v. Allen*, 171 Federal 907-917), and was not denied by the Circuit Court of Appeals in reversing the judgment of the trial court (*United States v. Allen*, 171 Federal 913-919).

The effect of the General Allotment Act of 1887 as applied to conditions similar to those in Oklahoma with reference to citizenship was considered by Judge Hanford in the cases of *United States v. Saunders*, 96 Federal 268; *United States v.*

Kopp, 110 Federal 161, and *Ex parte Viles*, 139 Federal 68; by Judge Whitson, in the case of *United States v. Dooley*, 151 Federal 697; by Judge A. L. Sanborn, in the case of *United States v. Auger et al*, 153 Federal 671; by Judge Pollock, in case of *Ex parte Savage*, 158 Federal 205; by Judge Quarles, in the case of *United States v. Hall*, 171 Federal 214, and by Judge Marshall, in the case of *United States v. Boss*, 160 Federal 132, all of whom arrived at the same conclusion as that arrived at by Judge Campbell in his opinion sustaining the demurrers to the bill.

Judge Campbell's conclusion was that every Indian in the Indian Territory is a citizen of the United States and of the State of Oklahoma, with all of the rights, privileges and immunities of citizenship, state and national; that the conferring of citizenship destroyed the relation of guardian and ward and placed the former members of the Five Civilized Tribes upon an equal footing with the other citizens of the United States, with whom they daily intermingled and came in contact.

It seems to us that the logic of Judge Campbell's opinion is unanswerable, and that there is no reasonable escape from the conclusions arrived at by him. These conclusions have the direct and unqualified support of Judge Adams, in his dissenting opinion in this cause. This dissenting opinion is, we insist, much more logical and much more in keeping with the established standard of statutory construction than is the majority opinion.

No such public policy exists as that upon which the jurisdiction of the trial court was sustained by majority of the Circuit Court of Appeals.

Prior to 1893 the members of the Five Civilized Tribes in the Indian Territory were wards of the United States, and the title to the tribal lands was in the tribes, respectively. The United States, therefore, had control of the lands because of

the fact that they were tribal lands, and of the members of the tribes because they were wards of the National Government.

In 1893 a new policy in dealing with these tribes found its inception in the Act of March 3d, 1893 (27 Stat. 645), authorizing the allotment in severalty of the tribal lands and provided that upon such allotment in severalty of the tribal lands the members of the said tribes "be deemed to be in all respects citizens of the United States," and thereupon the "reversionary interest of the United States shall be relinquished and shall cease."

The declared purpose of this Act was to make an equitable distribution of the tribal property, confer citizenship upon the members thereof, relinquish the reversionary interest of the United States and prepare the territory for statehood. In other words, to individualize the tribal holdings, giving fee simple title to the allottees, endowing them with full citizenship and forever severing the relation of guardian and ward.

This policy was persistently carried out through all the years from March, 1893, to June 21st, 1906.

The United States originally had control of the individual Indian because of its guardianship. It had control of the lands, because they were tribal domain. It is incomprehensible that if it was the purpose of the Government to retain its control over either the *individual members* of the tribes or the allotted lands of such members that it should have, in 1901, deliberately severed the tie of personal control by making every Indian in the Indian Territory a citizen of the United States with all the rights, privileges and immunities of such. That if it was still the purpose to reserve the right to control the lands of the members of the Five Civilized Tribes, it was inexcusable on the part of the Government that it permitted the lands to be allotted in severalty to the individual members of the tribes, passing fee simple title to such members and relinquishing its reversionary interest, thereby severing its control over such property. If it had been the policy of the Government to exer-

cise the control that is now asserted, it certainly would not have severed personal control by the emancipation of its wards, and property control by the allotment in severalty of the reversionary interest of the United States.

The actions here referred to are absolutely inconsistent with the assertion of the policy contended for. The policy evidenced by this course of dealing was to emancipate the individual Indian from national guardianship and to convert the tribal domain, which might be managed or controlled by the National Government, into an individual fee simple holding which might not be controlled by the National Government.

We therefore respectfully submit that upon the question of whether or not such policy did, in fact, exist, the evidence is overwhelmingly against the Government's contention.

Public Policy as a Head of Federal Equity Jurisdiction.

Circuit Judge Adams, in his dissenting opinion in this case, makes the following statement:

"With no title, legal or equitable, to protect and no duty of a trust character to perform, a new head of equity jurisdiction had to be discovered to justify the maintenance of these suits by the Government; and this, it is claimed, is found in the obligations of the Government to enforce a great national policy."

Judge Amidon, speaking for the majority of the court, uses the following language:

"Turning now to the objections which were made and sustained by the trial court, has the Federal Government such an interest as entitles it to maintain these suits? It will be conceded at the outset that it has no legal or equitable estate in the allotments; and if such an estate is necessary it has no standing in court. It is, however, too plain for controversy that the Federal Government imposed restrictions upon alienation of these allotments. That restriction was its main reliance for

the social and industrial elevation of the Indians. Has it a standing in court for the enforcement of its policy? To say that it has not is to make the restraints upon alienation a mere *bruten fulmen*."

Circuit Judge Adams, sitting as a member of the Court of Appeals, and District Judge Campbell, sitting as a trial judge, were each of the opinion that no such public policy existed as that outlined in the majority opinion, and that if it did exist it could not be enforced at the suit of the United States.

District Judge Amidon, with whom Circuit Judge Hook at least concurred in the results, determined that such a policy existed and that it afforded authority for the institution and maintenance of this suit and operated to confer jurisdiction upon the Circuit Court to entertain the same.

No better illustration can be had of the uncertainties resulting from a departure from the usual and ordinary canons of statutory construction and the adjudging and determining of rights without regard thereto upon a supposed public policy. Two judges say such a policy exists. Two of equal rank say it does not exist. The two who say the policy does not exist undertake to solve the questions presented by the ordinary canons of statutory construction. The two who say such a policy does exist apparently appeal to the *unwritten law* as a higher authority than the positive enactment of a statute.

We respectfully insist that in declining to apply the terms of the statute and in determining the rights of the parties involved in this controversy upon the supposed public policy, the Circuit Court of Appeals committed serious error.

This Court, in the case of *Hadden v. Collector* (5 Wallace 107-111), uses the following language with reference to the suggestion that it should be controlled by the public policy of the Government in interpreting certain legislation, to-wit:

"What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing upon which all sorts of notions, each vari-

ant from the other, may be formed by different persons. It is a ground much too unstable on which to rest the judgment of the court in the interpretation of statutes." (Italics ours.)

In the case of *Bate Refrigerating Company v. Sulzberger* (157 U. S. 1-36), where this Court was again invited to depart from the ordinary canons of construction and follow a supposed public policy, the following language is used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden v. Collector* (5 Wallace 107-111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.'"

In the case of *Dewey v. United States* (178 U. S. 510-521), this Court, discussing the matter of determining the effect of a statute by supposed public policy, uses the following language:

"In our examination of this case we have not forgotten the skill and heroism displayed by the distinguished commander of our fleet in the battle of Manila, as well as by the officers and sailors acting under his orders. All genuine Americans recall with delight and pride the marvelous achievements of our navy in that memorable engagement. But this Court cannot permit considerations of that character to control its determination of a judicial question or induce it to depart from the established rules for the interpretation of the statutes. Nor can we allow our judgment to be influenced by the circumstances that Congress has recently repealed all statutes giving bounty to officers and soldiers of the navy for the sinking or destruction hereafter, in time of war, of an enemy's vessels, thereby, it may be assumed, indicating that in the judgment of

the legislative branch of the Government the policy of giving bounties to the navy *was not founded in wisdom and should be abandoned. This Court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress.* What is termed the policy of the Government in reference to any particular subject of legislation, this Court has said, 'is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' (*Hadden v. The Collector*, 5 Wall. 107, 111.) Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be the law which Congress has not enacted as such." (Italics ours.)

We desire to again call the Court's attention to a previous quotation from the opinion of this Court in the case of *State of Oklahoma v. Atchison, Topeka & Santa Fe Railway Company*, *supra*. It is as follows:

"We are of the opinion that the words in the Constitution conferring original jurisdiction on this Court in a suit 'in which a state shall be a party' are not to be interpreted as conferring such jurisdiction in every case in which the state elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or *public policy* against wrongdoers generally." (Italics ours.)

If the enforcement of a public policy or of a law of a state is not sufficient to justify a state to maintain an original proceeding in this Court, how can it be said that the enforcement of a public policy is sufficient to confer jurisdiction upon the Circuit Court of the United States?

The attention of the Court is also invited to the following cases:

In re Wolfe & Levy, 122 Federal 127-133.

Southern Ry. Co. v. Machinists' Local Union, 111 Federal 49-57.

Shellenberger v. Ransom, (Neb.) 59 N. W. 935.

United States v. Chongsam, 47 Federal 884.

Opinion of the Justices, 66 N. H. 665, 33 Atlantic 1095.

The Circuit Court of Appeals apparently held that the interest of the United States in seeing its laws enforced was sufficient to justify the initiation of a proceeding upon its behalf purporting to be in favor of one citizen in a state against another in the same state, to remedy the supposed infraction of such laws.

The authority for this proceeding, as determined by said court, is the public policy of the United States to see that its laws are enforced. It is undoubtedly the policy of every Government that the laws enacted by its legislative body should be observed and enforced. We are not aware of any case in which it has been held that the United States may intermeddle in controversies between citizens of a state or create controversies between citizens of a state over their objections, because, in the judgment of some administrative officer, the laws of the United States, which are neither criminal nor penal in their nature, have not been observed in the making of the transaction assailed.

Provision is made by the laws of the United States for the acquiring of homesteads by certain persons upon public lands of the United States and for the protection of such homesteaders against incompetency, bad judgment and misfortune. It is provided (Revised Statutes, Sec. 2296) that "no lands acquired under the provisions of the chapter shall, in any event, become liable for the satisfaction of any debt contracted prior to the issuing of the patent therefor." It is, therefore, undoubtedly the declared policy of the United States to protect the homesteader on the public lands against enforced alienation

of his homestead upon any debt contracted prior to the issuing of the patent.

Suppose such homestead be levied upon under an execution issued upon a judgment for a prior debt. Could the United States bring a suit to enjoin the sale of the property under execution or take any other proceeding to prevent such sale? If public policy is sufficient authority for the institution of a suit in the Circuit Court of the United States to cancel a conveyance made by one citizen of the State of Oklahoma to another, why would it not be sufficient authority to institute a suit to prevent the enforced sale upon a prior debt of a homestead selected out of the public lands?

Almost every state in the Union has a homestead law which exempts from enforced sale a certain amount of land reserved as a homestead for the protection of the family. It is the declared policy of the states to protect the family against the incompetency and financial embarrassments of the husband. Such policy of protection is, perhaps, the most deeply rooted of any declared policy in any state. Could the state maintain an action in its own name to prevent the enforced sale of such homestead in violation of a constitutional or statutory provision? The alienation of lands by minors is generally prohibited. May the state bring suits in its own name to enforce its policy of protection to minors for the purpose of setting aside a conveyance made by a minor? Such proceeding is unheard of in legal lore. Yet, would there not be more reason for sustaining such an action than for sustaining the action at bar?

Married women in many states are prohibited from conveying their real estate except upon certain conditions and under certain limitations. Could the state maintain an action in its own name to set aside a conveyance made by a married woman for the purpose of enforcing its policy of protection?

Special legislation has been enacted in most states for the protection of idiots and insane persons and their estates. It is, no doubt, the avowed policy of every state to prevent idiots

and insane persons from conveying their property. May a state, to enforce its policy, bring a suit to set aside conveyances so made? We know of no such proceeding, nor do we believe that the courts of any state in the Union would entertain such an one.

There are hundreds of laws enacted by the state in the exercise of its police powers, and, no doubt, always it is the express policy of the state that such laws shall be observed. Many of them affect or control the ordinary every-day transactions of life. No one will insist that the state could, as between its citizens, institute a suit in its own name to revoke any contract or conveyance, in the making of which the parties failed to observe the provisions of any law of the state.

The Act of May 27th, 1908.

We can perhaps do no better than preface our discussion of this subject with a quotation from the opinion of Judge Campbell in disposing of this phase of the matter in the trial court and of Judge Adams in his dissenting opinion in the Circuit Court of Appeals.

We quote as follows from the opinion of Judge Campbell in case of *United States v. Allen et al*, 171 Federal 907, 13:

"In the Act of Congress approved May 27, 1908 (35 Stat. 314, c. 199), relative to removal of restrictions, is found the following provision:

'Nothing in this Act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the

Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this Act.'

It is contended that this provision confers upon complainant authority to institute and maintain these suits in the name of the United States. The dominant purpose of this provision seems to be to preclude any such construction of the Act as would deny the United States the right to bring such suits referred to, rather than to confer such right. The bill, as originally introduced, did not contain this provision. On February 10, 1908, at the same session, a bill was introduced by Mr. Sherman, in the House, and Senator Clapp, in the Senate, specifically conferring upon the Attorney General the right to bring such suits in the name of the United States, 'for the use and benefit and on behalf of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes, or any enrolled member of either thereof.' This bill covers over six pages, providing in detail for the conduct of such suits, and also providing for the transfer from the state to the federal courts of such suits in which the United States may become a party, as provided in the bill. This bill did not become a law. After its introduction, and while the Committee on Indian Affairs was considering the Act of May 27, 1908 (35 Stat. 312, c. 199), the Assistant Attorney General for the Interior Department appeared before the committee (Report of Committee on Indian Affairs of March 20, 1908), stating that the department was in favor of the bill under consideration, but calling attention to the jurisdictional bill above referred to, saying that:

'The Department believes that some provision for jurisdiction should be passed with the other bill, for these reasons, briefly, that, if it is not necessary, it could do no damage.'

He then referred to a number of cases arising in the state courts, wherein he deemed it advisable that provision be made for removal to the Federal Court. He said:

'The Department feels that if the restrictions bill should be passed separately that there would be no possible chance, perhaps, to enact this other bill, because the term is approaching its end, and it is very difficult to get any legislation where there is any direct, active opposition to

it. That being the history of such efforts, it is the feeling of the Department that the two should be passed together.'

Then followed a lengthy discussion between the representatives of the Department and members of the committee relative to incorporating such jurisdictional provisions. It was conceded that without such provision the existence of the authority and jurisdiction was not without question, the Assistant Attorney General insisting, however, that it already existed. Three of the Oklahoma representatives on the committee opposed the incorporation of a measure granting additional jurisdiction, insisting that only such powers and jurisdiction as already existed by virtue of the Enabling Act and other legislation should be exercised by the Federal Government, and conceded that, if they existed, their exercise was proper. Finally the paragraph now being considered was incorporated.

The jurisdiction bill which failed was one positively and specifically conferring the authority and jurisdiction as if they had not theretofore existed. This provision is negative in its terms, not purporting to confer the right, but disavowing any intention to deny the same. Therefore it can hardly be said that these eleven lines were incorporated in this bill in lieu of the jurisdiction bill containing over six pages. In view of this legislative history, it is my opinion that it was only intended by this paragraph to provide that, if by existing legislation the United States had authority to institute and maintain such suits, it was not the desire nor the intention of Congress for this Act to deny it, and it should not be so construed.

It is urged that the appropriation of money for such suits is a legislative recognition of their validity. In my judgment, it cannot be so construed in this case. It is the expressed purpose of Congress not to deny the right if it existed. A refusal to provide money for the conduct of such suits would have prevented their institution and maintenance, resulting the same as a denial of the right. Hence the appropriation. The authority of the complainant to maintain these suits, if it exists, must be found elsewhere."

We also quote from the dissenting opinion of Judge Adams in the case of *United States v. Allen et al*, 179 Federal 13, 24, as follows:

"The foregoing considerations, in my opinion, indicate that Congress has adopted a new policy concerning these Indians, namely, the promotion of self-reliance, self-respect, economy and thrift, and to this end, after making the special provision above indicated and perhaps others of like character, has left them otherwise subject to general laws governing all citizens. Equality of opportunity is all an American citizen ought to demand; and this and more in the respects just indicated Congress has given the members of the Five Civilized Tribes. With these special provisions made in their behalf the legislative intent and purpose seems to have been to leave them to justify their right to citizenship by coping with other citizens in the affairs of life on an equal footing without the expectation or hope of other special governmental intervention. Such intervention in the way of institution of suits at wholesale as done in these cases, without the request or consent of the Indians, is not only humiliating in itself, but tends to defeat the true national policy by discouraging self-reliance and independence of action. The policy of encouraging and aiding the Indians to act for themselves independently, rather than of aggressively interfering without their consent, to assert their statutory rights is distinctly recognized, if not commanded, in Section 6 of the Act of May 27, 1908, above cited. Section 1 of that Act as already pointed out imposes certain restrictions upon the alienation of lands by the Indians. Section 6, after authorizing the Secretary of the Interior or his representatives to take special interest in behalf of minors under guardianship, enacts that:

'Said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands, of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land, he shall, without charge, except the necessary court and recording fees and expenses, if any, in

the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other incumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.'

Notwithstanding other provisions of the Act referred to in the opinion of the majority, I think the part just quoted manifests a clear legislative intent and purpose that the United States, by and through the Secretary of the Interior, should act with respect to the violation of restrictions primarily in an advisory way, and instead of ever bringing suit in its own name at pleasure, should bring them only when requested by allottees, and then only in their names. If these suits can be maintained, it is not apparent where the Government can stop in its litigation in behalf of private persons in the enforcement of national policies. There are certainly many recognized policies besides the Indian policy which might be materially subserved by the practice of governmental intervention as in this case. Where would it end? In my opinion, the judgment below should be affirmed."

It is patent to the most casual observer that if protection to the Indian allottees is what the Department is really seeking, that ample provision is made therefor in Section 6 of said Act, independently of any right to maintain a suit by the United States to cancel the conveyances involved. Such provision having been made and Congress having declined to give the right asserted, is it not a more reasonable assumption that Congress intended for the Department to exercise the right granted and not to exercise the right which it refused to grant?

It seems to us that the learned judge who rendered the opinion for the majority of the court in the Circuit Court of Appeals has made an unjustifiable application of one of the paragraphs of said Act, to-wit, the concluding paragraph of

Section 6. The other, and we think controlling, provisions of said Act are ignored and are given no effect whatever. He proceeds, if we interpret his language correctly, to hold that the language, "Nothing in this Act shall be construed as a *denial* of the United States to take such steps as may be necessary," etc., operates to confer not only authority upon the United States to maintain an action in its own name, but jurisdiction upon the Circuit Court of the United States to entertain the same. The result of the language used is in effect to say that a declaration that the provisions of the Act shall not operate as a *denial* of a certain right is the equivalent of a positive *grant* of the *right*. Not only this, but the effect of the decision is to go further, and confer jurisdiction upon the Circuit Court to entertain a suit which the learned judge decides has been by a *negative* provision *affirmatively* granted.

We most respectfully insist that this interpretation of the statute is neither natural, plausible, nor justified by the context or the history of the Act.

During the consideration of the Act of May 27, 1908, the Secretary of the Interior sent to Senator Clapp, chairman of the Senate Committee on Indian Affairs, a proposed Section 2 of said Act, which read as follows:

"That any suit or suits provided for in this Act may be instituted in any court of the State of Oklahoma where jurisdiction over the subject matter and person may be had according to the laws of said state, or in the Circuit Court of the United States for the Eastern District of Oklahoma, and the said Circuit Court of the United States is hereby given jurisdiction, concurrent with the courts of said state, in any and all of the suits and proceedings authorized by this Act, without regard to the amount in controversy."

This proposed draft was accompanied by a letter giving the reasons why it was insisted the provisions ought to become a law. The departments seeking legislation insisted upon the

enlargement of the jurisdiction of the Circuit Court by a distinct and definite provision. Such enlargement of jurisdiction was resisted, the final result being nothing more than a declaration that the Act itself could not operate as a denial of jurisdiction.

We respectfully submit that the interpretation of the Act by Judges Adams and Campbell is the correct one. We doubt seriously, notwithstanding the language of this Court in the case of *Tiger v. Investment Company*, if it lies within the power of Congress under the Constitution to confer jurisdiction upon a Circuit Court of the United States to entertain a suit by the United States in its name and on behalf of, but over the objection of, a citizen of Oklahoma touching his property or contract rights, and this notwithstanding the reservations in the Enabling Act. The power of Congress in this particular rests on the eighth section of Article 2 of the Federal Constitution. This provision is as follows:

"The Congress shall have power * * * to regulate commerce with the foreign nations and among the several states and with the Indian tribes. * * *"

We most earnestly protest that the authorization, even if attempted, to bring a suit in the name of the United States for and on behalf of a citizen of the State of Oklahoma, over his protest and objection, or without his consent, is not a regulation of commerce with an Indian tribe. And we further respectfully submit, in view of the decision in the case of *Coyle v. Smith*, 31 Sup. Ct. Rep. 688, *Advance Sheets; Pollards, Lessee, v. Hagan*, 3 How. 212-235; *Escamba v. Chicago*, 107 U. S. 678; *Bolln v. Neb.*, 176 U. S. 83, and *Dick v. U. S.*, 208 U. S. 340, that an agreement between the United States and the State of Oklahoma, that such might be done, would be violative of the Federal Constituion and void. To say that Congress would have such right because the citizens affected

thereby happen to be of Indian ancestry, either direct or remote, would be to hold to the right of Congress to legislate in regulation of the ordinary affairs of the citizens of the State of Oklahoma who happen to be of Indian descent for all time to come. We do not believe such authority exists under the Constitution or that it was the purpose of Congress by the passage of the Act of May 27, 1908, to provide for the exercise of such authority. It might as well be contended that the allowance by Congress of an appeal from the Circuit Court of Appeals of the Eighth Circuit from orders reversing judgments of the trial court which immediately followed the action of the Circuit Court of Appeals reversing the judgment of the trial court in this case was a declaration by Congress that it did not intend to confer such jurisdiction, as to hold that the provisions of the Act of May 27, 1908, or elsewhere, making an appropriation for the maintenance of suits, conferred such jurisdiction upon Circuit Courts.

There Is a Defect of Parties.

The allottees are indispensable parties:

(1) They own the lands involved and have such an interest in the subject matter of the controversies that final decrees cannot be made without affecting their interest.

(2) The causes of action, if any, are theirs; they have the right to conduct suits either in the state or federal courts to test the validity of the conveyances sought to be canceled. Perhaps many of them now have actions in the state courts to cancel the conveyances attacked here. Decrees in the cases at bar can have no effect as between the purchasers and the allottees. Estoppel by judgment must be mutual. These cases cannot make an end of the litigation.

(3) If the United States had the right to maintain these suits the same right would be co-existent in the allottees, and for this reason they must be made parties.

(4) Every party to a contract except one who has released his interest or an agent through whom the title has passed is an indispensable party to set it aside.

(5) If the allottees are not made parties and it should be held that any of the conveyances are void the final determination may be wholly inconsistent with equity and good conscience on account of the allottees retaining the consideration paid by the purchasers and still in the hands of the allottees, and on account of the taking without recompense of the improvements made by the purchasers in good faith, which improvements have imparted value to the lands.

(6) If Indians or freedmen have made void conveyances covering their lands the situation is analogous to that of void conveyances of family homesteads made inalienable by state laws, or void conveyances by the insane or other incompetents—the sovereignty has no right or duty to cancel such conveyances, this right reposing both by natural justice and constitutional law in the owners of the lands or their legal representatives.

(7) Section 6 of the Act of May 27, 1908, clearly provides that the Secretary of the Interior shall act only in an advisory way for the allottees whose lands are restricted, and that his representatives shall, when necessary, bring suit in the names of the allottees without charge for legal service, instead of the Secretary bringing suits in the name of the United States at wholesale without the request or consent of the allottees.

In the case of *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 826, Mr. Justice Miller, delivering the opinion of the court, said:

"The learning on the subject of parties to suits in chancery is copious, and within a limited extent the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that, while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such that if their interest and their absence are formally brought to the attention of the court it will require them to be made parties if within its jurisdiction, before deciding the case. But if this cannot be done it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties that their legal presence as parties to the proceedings is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to the jurisdiction.

This class cannot be better described than in the language of this Court in *Shields v. Barrow*, 17 How. 130 (15 L. Ed. 158), in which a very able and satisfactory discussion of the whole subject is had. They are there said to be 'persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.'"

In *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed., p. 187. the Court used this language:

"* * * The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First. Where a person will be directly affected by a

decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Second. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Third. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

In *Ribon v. Railroad Companies*, 16 Wall. 446, 21 L. Ed. 368, the rule for indispensable parties is thus presented:

"The rule in equity as to parties defendant is that all whose interests will be affected by the decree sought to be obtained must be before the court; and if any such persons cannot be reached by process (do not voluntarily appear, or from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties) the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and those absent are inseparable, the obstacle is insuperable. The Act of Congress of 1839 and the rule of this Court upon the subject give no warrant for the idea that parties whose presence was before indispensable could thereafter be dispensed with. The subject was fully considered in *Shields v. Barrow*, 17 How. 130 (58 U. S., XV., 158). What is there said need not be repeated."

In *Mallow v. Hinde*, 12 Wheat. 198, 6 L. Ed. 599, the reason underlying the rule for indispensable parties is stated thus:

"In this case the complainants have no rights separable from and independent of the rights of persons not made parties. The rights of those not before the court lie at

the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.

We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

In *Chadbourn v. Coe*, 51 Fed. 479, the Circuit Court of Appeals for the Eighth Circuit summarized the rules of equity practice as to parties as follows:

"* * * 'Necessary parties' are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Such persons must be made parties, if practicable, in obedience to the general rule which requires all persons to be made parties who are interested in the controversy, in order that there may be an end of litigation; but the rule in the federal courts is that if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may proceed to a final decree between the parties before the court, leaving the rights of the absent parties untouched, and to be determined in any competent forum. The reason for this liberal rule in dispensing with necessary parties in the federal courts will be presently stated. 'Indispensable parties' are those who not only have an interest in the subject matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Shields v. Barrow*, 17 How. 139; *Ribon v. Railroad Cos.*, 16 Wall. 450; *Coiron v. Mil-laudon*, 19 How. 113; *Williams v. Bankhead*, 19 Wall. 563;

Kendig v. Dean, 97 U. S. 423; *Alexander v. Horner*, 1 McCrary 634.

The general rule as to parties in chancery is that persons falling within the definition of 'necessary parties' must be brought in, for the purpose of putting an end to the whole controversy, or the bill will be dismissed, and this is still the rule in most of the state courts. But in the federal courts this rule has been relaxed. The relaxation resulted from two causes: First, the limitation imposed upon the jurisdiction of these courts by the citizenship of the parties, and, secondly, their inability to bring in parties, out of their jurisdiction, by publication. The extent of the relaxation of the general rule in the Federal Court is expressed in the forty-seventh equity rule. That rule is simply declaratory of the previous decisions of the Supreme Court on the subject of the rule. The Supreme Court has said repeatedly that, notwithstanding this rule, a Circuit Court can make no decree affecting the rights of an absent person, and that all persons whose interests would be directly affected by the decree are indispensable parties. *Shields v. Barrow*, *supra*; *Ribon v. Railroad Cos.*, *supra*; *Coiron v. Millaudon*, *supra*; *Alexander v. Horner*, *supra*; *Cole S. M. Co. v. Virginia & G. H. W. Co.*, 1 Sawy. 685."

The allottees are parties in interest. They own the lands involved. All except the Seminoles have their patents. The Seminoles have a perfect equity in their lands; they have long since received their allotments, and certificates have issued therefor; they have taken possession of their lands and performed every duty upon their part to be performed. Patents should have been delivered to them long ago and are now withheld by those who ought to deliver them, though executed and ready for delivery. The allottees are therefore principally and fundamentally interested. They are the only parties to be benefited by the decrees if the Government wins. They are the parties against whom the purchasers of lands involved desire a judgment that will be binding. Their rights are to be determined. If void conveyances have been made by the allottees,

and on account thereof their titles are clouded and the use and possession of their lands lost for the time being, then their wrongs are to be redressed, their rights restored. It is clear that the Government cannot conduct litigation for and bind the citizens of the United States and citizens of Oklahoma who are owners of the fee simple title of their lands without their presence in court. It is equally clear that heretofore the Government has never maintained suits in the interest of Indians except in cases where it had some title, legal or equitable, to protect or a duty of a trust character to perform, and in all such cases the Indians were bound by the result. To meet this difficulty the majority of the court below provided by judicial discovery a ground for the Government's actions never invoked heretofore, as was stated in the dissenting opinion by Judge Adams:

"With no title, legal or equitable, to protect, and no duty of a trust character to perform, a new head of equity jurisdiction had to be discovered to justify the maintenance of these suits by the Government, and this it is claimed is found in the obligation of the Government to enforce a great national policy."

The United States cannot have rights in these cases separable from and independent of the rights of the allottees who are not made parties. The rights of the allottees who are not before the court lie at the very foundation of the claim of right by the United States, and therefore the attempted distinction between the rights of the allottees and the rights sought to be enforced by the Government in these cases is not real. As was stated in *Mallow v. Hinde, supra*:

"The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and final decision cannot be made. * * * We put it on the ground that no court can adjudicate directly upon a person's rights without the party being either actually or constructively before the court."

The right of the owners of the land involved to conduct suits in their own names either in the state or federal courts to determine the validity of these conveyances is conceded. It is a matter of common knowledge that allottees are now conducting such suits for themselves in the state courts of Oklahoma. There they seek the cancellation of some of the deeds here involved. Their suits will result in judgments binding upon both vendors and purchasers. Decrees in the cases at bar will affect only the purchasers, if they can have any effect at all. The pendency of the suits here is not even a bar to the prosecution of those there. Decrees against the United States in these cases could not be set up as defense there. Here the merits of the cases as to the allottees individually are not involved; there the merits of the controversies in the cases at bar are involved as to the allottees. If these cases by the United States progress to final decrees doubtless many of the allottees will claim, as is true, that the so-called classification of the Indian lands as to alienability is more fanciful than real; that there are many questions of alienability involved which will not be properly presented to the court for adjudication in these cases. Therefore the litigation will continue and become more and more burdensome and oppressive to *bona fide* purchasers of lands in the territory heretofore that of the Five Civilized Tribes.

If the United States had the right co-existent with the allottees to sue it would nevertheless be necessary to bring them before the court. Bates on Federal Equity Procedure, at Section 40, says:

"And 'the principle that persons having co-existent rights with the plaintiff to sue the defendant must be brought before the court in all cases where the subject matter of the right is to be litigated in equity is not confined to cases where such co-existent rights to sue are at law; it applies equally to cases where another person has a right

to sue for the matter in equity; in such cases the defendant is equally entitled to insist that persons possessing such a right should be brought before the court before any decree is pronounced, in order that such right may be bound by the decree.' The rules apply whether the legal or equitable right to sue extends to the whole or only a portion of the subject of the suit."

Every party to a contract of sale except one who has released his interest or an agent through whom the title has passed is a necessary party to set it aside.

- Shields v. Barrow*, 17 How. 130.
Coiron v. Millaudon, 19 How. 113.
Gaylords v. Kelshaw, 1 Wall. 81.
Ribon v. Railroad Cos., 16 Wall. 446.
Lawrence v. Wirtz, 1 Wash. C. C. 417.
Tobin v. Walkinshaw, 1 McAll. 26.
Bell v. Donohoe, 17 Fed. R. 710.
Florence E. Mach. Co. v. Singer Mfg. Co., 4 Fisher's Pat. Cas. 329; s. c., 8 Blatchf. C. C. 113.
Chadbourne v. Coe, 45 Fed. R. 822.
Empire C. & T. Co. v. Empire C. & M. Co., 150 U. S. 159.
New Orleans W. Co. v. New Orleans, 164 U. S. 471; s. c. in C. C. A., 51 Fed. R. 479.
Clark v. Great Northern Ry. Co., 81 Fed. R. 282.
 But see *French v. Shoemaker*, 14 Wall. 314.
West v. Duncan, 42 Fed. R. 430.
Smith v. Lee, 77 Fed. R. 779.

If any of the deeds taken in good faith are held to be void final decrees in these cases against the purchasers would leave matters in a condition wholly inconsistent with equity and good conscience. The bills show that large considerations passed to the vendors. It is reasonable to presume that a large part of the consideration so paid is yet in the hands of the allottees. It is fair to suppose that in many cases other property, such as realty in cities or other farm lands, were exchanged for the

lands involved. If the vendors were parties to these suits they could not retain the purchase price in their hands or other property which they have received in exchange, for he who seeks equity must do equity. If any of the conveyances are void on account of restrictions we do not claim that the Court should decree a return of the consideration as a condition precedent to the surrender of the restricted lands, but where the consideration is yet in the hands of the allottees they should be compelled to return it, and in the same suits in which they seek cancellation of their deeds. And it also seems to us clear that in every case where the parties acted in good faith the Court ought to decree a personal judgment against the allottees for the amount of the consideration, for it was paid by mistake and the consideration for the payment has failed. If the contracts were void, but in good faith, equity will impute a promise to repay.

Wrought Iron Bridge Co. v. Utica, 17 Fed. R. 316.
City of Louisiana v. Wood, 12 Otto 294, 26 L. Ed. 153.

Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040.
Tate v. Gains, (Okla.) 105 Pac. 193.

In *Wrought Iron Bridge Company v. Town of Utica*, *supra*, the Court said:

"I do not care to spend time upon a metaphysical discussion of the question whether complainant acted under a mistake of fact or a mistake of law in making this contract. * * * Payment was refused by the county on the ground that the notes and mortgage given to secure the same were void for want of power to make them. The seller filed a bill to obtain restitution of his property. * * * The bridge has not been paid for and they have, therefore, no equitable right to keep it without paying for it."

In *Tate v. Gains*, *supra*, which involved the validity of a contract made between an Indian and a purchaser of his land, providing that if the purchaser lose possession of the land on account of restrictions upon it that the Indian would restore the purchase price, the court said:

"Under the contract and the law, defendant yielded possession *in praesenti*, or from day to day, and plaintiff secured it in the same way. Such a possession creates a tenancy at will. * * * The estate may arise by implication as well as by express words. So, while the conveyance was wholly void and of no effect in itself, the possession of the grantee amounted to a tenancy at will, not made so by the void conveyance, but because out of the effort to deal came a permission to enter the land, relieving grantee of the imputation of and liability for trespass. In order to secure this possession, grantee offered, and had accepted by grantor, a certain sum of money, and within the understanding of the parties grantee was to improve the land while permitted to remain in possession. * * * There is no reason we can perceive why the defendant, having secured from plaintiff under the arrangement mentioned in this case the money and property involved, should be permitted, upon repossessing herself of the consideration therefor, to retain both. A reasonable rental is certainly all that she has a right to claim."

The obligation to do justice rests upon all persons, including Indians, and therefore if the allottees have obtained money or property without authority and without consideration the law, independent of any statute, will compel restitution or compensation, and this ought to be made in the same action and at the same time that the void contracts are canceled.

This further question will arise in the event any of the deeds are invalid: Where these allottees have received the benefit of an invalid contract and such benefit is permanent and substantial and connected with the land, adding additional

value thereto, which gives land that had no rental value great value for rental purposes, will the law permit the parties causing such benefits to accrue, believing that they acted within the pale of law, to be recompensed therefor when the allottees seek to avoid such illegal contracts? Or to put the matter in a different way: Shall the lands that were useless increase in intrinsic value and become the source of constant benefit through the *bona fide* expenditures upon the part of the purchasers without creating a legal obligation whereby the owners shall be made to compensate those who made the improvements? This situation should be disposed of as when the lands of minors have been improved under the terms of void improvement leases by the guardians. Valuable and lasting improvements have been made often in good faith under void contracts upon the lands of minors under such circumstances that the courts have treated as done that which ought to have been done, and have recompensed those who gave the land value by improvements. If proper application had been made to the probate courts for such improvement leases the request would have been granted, and, in order to do justice to the occupants under the void contracts, the law has implied a valid obligation to recompense the lessees, not for the value of the improvements but for the enhanced value of the premises. Likewise, if deeds are canceled because the lands were inalienable where the parties were in good faith, the Court should imply as done that which ought to have been done, and would have been done, perhaps, if proper application had been made to the Secretary of the Interior. And though the void deeds will be treated as nullities, the law will imply just such an obligation to pay for the enhanced value to the premises on account of the improvements as the Secretary of the Interior would have permitted the allottees to contract upon proper application to him. Where the lands had no rental value, and, on account of the improvements so made in good faith, now have a great rental value,

it should be decreed that the rentals or a part thereof be set aside each year until compensation shall have been made for the same.

Muskogee Development Co. v. Green, (Okla.) 97 Pac. 619.

White v. Brown, (Ind. T.) 38 S. W. 335.

Poplin v. Clausen, 38 S. W. 974.

Shumate v. Harbin, 15 S. E. 270.

Brockway v. Thomas, 36 Ark. 518.

Beard v. Dansby, 48 Ark. 183, 2 S. W. 701; and

Potts v. Cullum, 68 Ill. 217.

A great number of the conveyances attacked belong to classes held to be good by the Supreme Court of Oklahoma, and by the United States courts in Oklahoma, and it is not necessary to argue that the purchasers of such lands have acted in good faith. Moreover, on account of the many confusing and conflicting laws governing the lands allotted to members of the Five Civilized Tribes, it is certain that some honest persons have been misled as to the character of the conveyances to them. The contention of the Government that the lands were inalienable when the conveyances were made makes it imperative that the allottees be brought in so that there may be an end of the litigation and that purchasers may be protected both in the consideration paid and for their improvements made in good faith in the event the purchasers lose.

It is not necessary for the Government to interfere merely because void conveyances have been made upon restricted lands. If this has been done, the situation is analogous to cases where deeds have been executed upon homesteads restricted by state laws, or where void conveyances have been made by infants or insane persons. In the history of our jurisprudence it has never been held necessary, we believe, for the sovereign imposing the restrictions to interfere by suit to protect those for

whose benefit the restrictions were imposed. Few are so foolish as to knowingly violate laws against alienation of lands. The courts are ready to give relief. What the situation needs is test cases to settle questions of alienability, and not wholesale and oppressive suits.

Section 6 of the Act of May 27, 1908, provides:

"Said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands, of all their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other incumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands."

This clearly means that the Secretary of the Interior, instead of being authorized to conduct suits against purchasers of Indian lands, is authorized merely to advise and assist all allottees whose lands are restricted. His representatives in the various counties in Eastern Oklahoma are directed to institute suits, without attorney fees, for such allottees and *in their names* to remove clouds from their title.

Bill Is Devoid of Equity.

The United States cannot maintain this bill because they are wholly devoid of equity.

The United States have not offered to return the consideration paid, they are out of possession, and if the facts alleged are true, they have an adequate remedy at law. That a bill in equity is not a proper remedy for the recovery of real estate held adversely, attention is called to the opinion of this Court in *Frost v. Spitley*, 121 U. S. 552, in which it is said (p. 556) :

“Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff.”

In *Orton v. Smith*, 18 How. 263, Mr. Justice Grier, speaking for the Court, says in the following language:

“Those only who have a clear, legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title.”

The language of the Court in this case of *Frost v. Spitley*, and *Orton v. Smith*, *supra*, is quoted with approval in *Dick v. Forraker*, 155 U. S. 404, 414.

In *The United States v. Wilson*, 118 U. S. 86, where the United States served numerous defendants and a demurrer was sustained and appeal taken by the United States, Mr. Justice Mathews, speaking for this Court, used the following language in disposing of the case (p. 89) :

"Having the legal title, then, but being kept out of possession by the defendants holding adversely, the remedy of the United States is at law to recover possession. Equity in such cases has no jurisdiction, unless it is required to remove obstacles which prevent a successful resort to an action of ejectment, or when, after repeated actions at law, its jurisdiction is invoked to prevent a multiplicity of suits, or there are other specific equitable grounds for relief. Bills *quia timet*, such as this is, to remove a cloud from a legal title, cannot be brought by one not in possession of the real estate in controversy, because the law gives a remedy by ejectment, which is plain, adequate and complete. This is the familiar doctrine of this Court. *Hipp v. Babin*, 19 Howard 271; *Ellis v. Davis*, 109 U. S. 485; *Killian v. Ebbinghaus*, 110 U. S. 568; *Fussell v. Gregg*, 113 U. S. 550."

This case would seem to effectively dispose of the rights of the United States to maintain these actions under the general equity practice.

It is true that if the state statute provides for the bringing of a suit to quiet title by a party out of possession, that the Federal courts can administer the said remedy. The statute in force in Oklahoma upon this subject is Section 4787 of Wilson's Statutes, and is as follows:

"An action may be brought by any person in possession, by himself or tenant, of real property against any person who claims an estate, or interest therein, adverse to him, for the purpose of determining such adverse estate or interest."

Under this statute and in keeping with this provision the Supreme Court of Oklahoma has HELD that actual possession is necessary to enable a party to maintain an action to quiet title, unless the premises are vacant or unoccupied (*Christy v. Spring*, 11 Okla. 710, 69 Pac. 864), and such was the construc-

tion of the statute of Kansas before it became the statute of Oklahoma.

If the conveyances referred to are void they constitute no cloud upon the title of the owner thereof, and a bill will not lie to cancel the same, even though the other grounds of equitable jurisdiction are present. *United States v. Saunders*, 96 Federal 268; *Piersol v. Elliott*, 6 Peters 96, 101; *Rich v. Braxton*, 158 U. S. 375, 407; *Kennedy v. Hazleton*, 128 U. S. 667, 672; *Town of Venice v. Woodruff*, 62 N. Y. 462, 467; *Marsh, Excutrix, et al v. The City of Brooklyn*, 59 N. Y. 280.

Bill of Complaint Is Multifarious.

Because of the joinder in the bill of distinct and independent matters, each of which would constitute, if the allegations were sufficient, a separate cause of action; and because of the joinder of several defendants, each holding separate, independent and distinct titles, having no connection whatever with each other, the bill is multifarious.

The reason for the rule against multifariousness is, the inconvenience of mixing up distinct matters which may require different proceedings or decrees and embarrass the defendant or defendants in the proper defense of each. (Story's Equity Pleading, Sec. 280; Cooper's Equity Pleading 183.) Among the various tests by which to determine whether or not a bill is multifarious, we call attention to the following:

1. Is there any connection between the transactions referred to?
2. Would each transaction be more properly determined without reference to the others?
3. Would evidence relevant to one be wholly irrelevant to others?
4. Would separate decrees be necessary?
5. Would the relief be properly separate and exclusive as to each case and each defendant under the allegations of each of the bills?

Every one of the tests defined by the authorities as a ground for multifariousness is present. Each one of these transactions is separate and distinct and depends on proof that would in no wise affect any other; evidence relevant to one would be wholly irrelevant to the others; separate trials, different evidence and separate decrees will be necessary and the relief, if any is granted, must be separate and exclusive as to each transaction and as to each defendant. If there is a cause of action existing against thousands of persons made parties defendant to these suits, it exists in favor of thousands of other citizens of the United States. If a cause of action exists, it is not in favor of the United States, but in favor of divers citizens of the United States. These bills are brought not upon any cause of action existing in favor of appellants, but upon supposed causes of action existing in favor of several thousand citizens of the United States residing in the State of Oklahoma and elsewhere and against several thousand other citizens and residents of the State of Oklahoma. Between five and ten thousand controversies between twice that number of citizens of the United States are to be tried in a very limited number of suits. If the ten thousand defendants against whom the suits are brought owe to the ten thousand citizens of the United States on whose behalf they are brought, separate notes for \$1,000.00 each, given for the purchase price of said lands, there would be just as much reason for sustaining a joinder of defendants in a suit brought by the United States on behalf of the allottees who are citizens of the United States to recover on these ten thousand notes, as there would be to cancel the conveyances involved.

The validity of each conveyance must depend upon the facts of the individual case. That the cases can be disposed of upon questions of law will not be seriously contended by anyone who is familiar with the records. Although there is some conflict among the cases as to when a single plaintiff may main-

tain a suit against numerous defendants, it is believed in the Federal courts, at least, the law is fairly well settled by the decision in *Hale v. Allinson*, 188 U. S. 56.

This Court adopted as its exposition of the law the opinion of McPherson, District Judge, reported in 102 Federal Reporter 790, as follows:

"Thereafter a different question arose for determination, namely, can the assessment be lawfully enforced against the individual charged herewith, and in this question the interest of each stockholder is separate and distinct. The bill asserts the conclusiveness of the Minnesota decree upon the defendants, so far as the necessity for the assessment and the amount charged against each stockholder are concerned. (*Bank v. Farnum*, 176 U. S. 640.) Assuming that position to be sound (and, if I do not assume it; if these questions are still open for determination, so far as the Pennsylvania stockholders are affected, the bill must fail for want of necessary parties), it is clear that only two classes of questions remain to be decided; the first is whether a given stockholder was ever liable in such; and the second is whether, if he were originally liable, his liability has ceased, either in whole or in part. Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defense, and defenses may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defenses are put in by differing defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff who has similar claims against many persons. But as each of these persons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his co-defendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and

not they, has done nothing to discharge the liability. Suppose A to aver that his signature to the subscription list was forgery; what connection has that averment with B's contention that his subscription was made by an agent who exceeded his powers? Or with C's defense that his subscription was obtained by fraudulent representations, or with D's defense that he discharged his full liability by a voluntary payment to the receiver himself? Or with E's defense, that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defenses, having nothing in common; and upon each, the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional rights. But, even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose conveniences must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of the witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law.

We are in accord with the views thus expressed and we therefore must deny the jurisdiction of equity, so far as it is based upon the asserted prevention of a multiplicity of suits."

Mr. Pomeroy's statement of the law, in his First and Second editions, was so broad as to bring unlimited criticism. To meet the criticism upon the broad statement of the right to maintain such suits, two paragraphs were inserted in the Third Edition, being numbered 251½ and 251¾. The statement of the law as contained in Section 251½, Vol. 1, page 371, is as follows:

"Jurisdiction Not Exercised When That Would Be Ineffectual: Simplifying of the Issues Essential.—It seems desirable to further emphasize and illustrate the author's statement that in cases apparently falling within classes third and fourth, where the jurisdiction depends on the multitude of plaintiffs or defendants, 'there must be some common relation, some common interest on some common question' in order that the one proceeding in equity may really avail to prevent a multiplicity of suits. The equity suit must result in a simplification or consolidation of the issues; if, after the numerous parties are joined, there still remain separate issues to be tried between each of them and the single defendant or plaintiff, nothing has been gained by the court of equity's assuming jurisdiction. In such a case, 'while the bill has only one number upon the docket and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon the separate and distinct liability of one defendant,' in cases resembling those of fourth class, or upon the separate and distinct claim of one plaintiff, in cases resembling those of the third class. In refusing to entertain these spurious 'bills of peace,' courts of equity impose no real limitation upon their jurisdiction, which by its very definition, exists not because of multiplicity of suits, but to avoid them, when their rules of procedure can avail to that purpose; indeed they merely apply to bills of this character the ordinary rules of equity pleading relating to multifariousness."

In note to this section, on page 371, attention is called to the case of *Best v. Drake*, 11 Hare, 371, reporting a case somewhat parallel to the case at bar. The note is as follows:

"A bill in chancery was this term preferred by a widow against 500 persons, to answer what moneys they owed her husband; the bill was above 3,000 sheets of paper, to the wonder of most people; but the Lord Chancellor looking on it as vexatious, for it would cost each defendant a 100*l.* the copying out, he dismissed the bill, and ordered Mr. Newman, the concellour, whose hand was to it, to pay the defendants the charges they had been at."

Multifariousness as described by the Circuit Court of Appeals for the Fourth Circuit, in the case of *Barcus et al v. Gates*, 89 Fed. 783, 791, is as follows:

"Multifariousness arises from the fact either that the transactions which form the subject matter of the suit are so separate and dissimilar that they cannot conveniently be tried in one record, or that some defendant is able to say that as to a large part of the transactions set out in the bill he has no interest or connection whatever. A bill is not multifarious because there are several causes of action, if they grow out of the same transaction, and if all of the defendants are interested in the same rights, and the relief against each is of the same general character, the bill may be sustained."

In *Gaines v. Chew*, 2 How. 619, the Supreme Court of the United States held the following tests of multifariousness in a bill:

"In general terms, a bill is said to be multifarious which seeks to enforce against different individuals demands which are wholly disconnected. An illustration of this, it is said, if an estate be sold in lots to different persons, the purchaser could not join in exhibiting one bill against the vendor for a specific performance. Nor could the vendor file a bill for a specific performance against all the purchasers. The contracts of purchase being distinct, in no way connected with each other, a bill for a specific execution, whether filed by the vendor or vendees, must be limited to one contract."

This case is quoted with approval and this doctrine reaffirmed in the case of *Brown v. Guaranty Trust Co.*, 128 U. S. 403, 410.

The application of the principles contained in the last mentioned case would, of necessity, result in declaring the bill involved multifarious.

The Court's attention is also called to the case of *Tribbett et al v. Illinois Central Ry. Co.*, 70 Miss. 182, 12 So. 32; *Turner*

v. *City of Mobile*, an Alabama case reported in 33 Southern 132; *Van Auken v. Dammeier*, 40 Pac. 89; *Tonkins v. Craig*, 93 Fed. 885.

These cases disclose that the question of whether the bill is multifarious or not need not necessarily be determined upon the face of the bill; that consideration should be given to issues that might be made by the several defendants upon the allegations contained in the bill. If separate and individual defenses may be made by each of the defendants, then the bill is multifarious within the rule laid down in *Hale v. Allinson*. As Judge McPherson said, in dismissing the bill in the trial court:

"Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose conveniences must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions of law."

This is a perfect description of the condition of pending case. If the rule declared by Judge McPherson and approved by this Court in *Hale v. Allinson*, *supra*, is to be followed, it is difficult to see how it can be held that the bill in this case is not multifarious or that it states a cause of action upon which equitable relief may be invoked.

Referring again briefly to the issues that may be made by answer interposed by the defendants, if they are required to answer; for instance, it is suggested in the bill (and we do not believe the suggestion in the form in which it is made arises to the dignity of an allegation) that the several allottees have full blood heirs, or perhaps in some cases that the grantor is an heir and a full blood. The conveyances herein involved were

all made prior to the time Congress undertook to declare the rolls prepared by the Secretary to be conclusive of the quantum of Indian blood. It is a matter of public notoriety that of the members of the Five Civilized Tribes who are enrolled as full bloods many are not full bloods. There seems to have been prevalent an opinion at the time the enrollment was made that a full blood would perhaps fare a little better than one of less Indian blood. No doubt, in many instances, a direct issue will be raised as to the quantum of Indian blood. A full-blood Indian will have heirs, some of whom are full bloods and some of much less degree Indian blood, and this is frequently the case. This illustration, notwithstanding the contention made by the United States, that the question presented is one of law, that it is not only possible but entirely probable that a myriad of questions of fact will arise in many, if not in all, of these cases. Issues differing with each individual transaction and having no relation whatever to each other.

We respectfully submit that the trial court was entirely right in holding the bill multifarious.

The lands involved were allotted in the name of certain deceased enrolled members pursuant to Section 22 of the Choctaw-Chickasaw Supplemental Agreement, approved July 1st, 1902 (32 Stat. 641) and descended to their heirs free from all restrictions upon alienation.

- a. *Review of Various Provisions of the Choctaw-Chickasaw Supplemental Agreement Providing for Allotment, Imposing Restrictions upon Alienation, Etc.*

The provisions of the Choctaw and Chickasaw Supplemental Agreement pertinent to the questions herein involved, insofar as they relate to the right of allottees or heirs to alienate lands,

are Sections 11, 12, 13, 15, 16, 22, 23, the intervening Sections 14, 17, 18, 19, 20 and 21 having no direct application to the questions herein involved. Sections 11, 12, 13, 15, 16, 22 and 23 are as follows:

SECTION 11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to 320 acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations; to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allotments and designating homesteads hereunder, the 40-acre or quarter-quarter subdivisions established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

SEC. 12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to 160 acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall be issued for said homestead.

SEC. 13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.

SEC. 15. Lands allotted to members and freedmen shall not be affected or incumbered by any deed, debt or obligation of any character contracted prior to the time at

which said land may be alienated under this Act, nor shall said lands be sold except as herein provided.

SEC. 16. All lands allotted to members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent. *Provided*, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal government for less than its appraised value.

SEC. 22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such persons would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in Chapter 49, Mansfield's Digest of the Statutes of Arkansas. *Provided*, that the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.

SEC. 23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian Agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment and shall remove therefrom all persons objectionable to such allottee and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

The lands involved in the controversy in this appeal are described in the bill as lands allotted to the following Indians:

"Lena John, deceased, full blood, Chickasaw by blood, roll 3376."

The conveyance is described as having been executed December 15, 1905, acknowledged December 15, 1903, and recorded December 19, 1903. (Rec. 7.) The statement that the conveyance was executed December 15, 1905, is clearly a typographical error, the date of execution being December 15, 1903. The ground of alleged invalidity is that the grantor is the daughter of the deceased allottee and is a full blood.

The next two conveyances sought to be set aside are the lands allotted to

"Simon Thompson, deceased, full blood, Chickasaw by blood, roll 4275."

These conveyances were by the heirs of Simon Thompson, dated March 2 and 6, 1905; recorded in February, 1906. The alleged ground of invalidity is that the deceased has surviving full blood heirs. (Rec. 7 and 8.)

The next conveyance sought to be set aside is that of Culberson Thompson, husband of Lucy Thompson, deceased, of lands allotted in the name of Lucy Thompson, deceased. This conveyance was made March 20, 1906, and recorded March 31, 1906. The ground upon which this conveyance is assailed is that Lucy Thompson has full blood heirs.

The next conveyance sought to be set aside is that of the lands allotted in the name of Minnie Ward, deceased; said conveyance being dated February 9, 1905, and recorded February 15, 1905, the alleged ground of invalidity being that Minnie Ward has full blood heirs.

These are all of the conveyances involved in this appeal, which are sought to be canceled by the bills.

It will be observed that each and every one of these conveyances involve allotments made in the name of a deceased allottee, pursuant to Section 22 of the Choctaw and Chickasaw

Supplemental Agreement, above set forth. Each of the conveyances covers lands allotted and designated as the homestead and surplus, respectively. The questions involved, therefore, are whether or not lands allotted in the name of a deceased allottee, under Section 22 of the Choctaw and Chickasaw Supplemental Agreement, were alienable at the time the various conveyances were made, all of the conveyances being made in the years 1903, 1905 and 1906, but prior to April 26th of said year.

Prior to April 26, 1906, there was no distinction whatever in the allotment agreements of the Choctaws and Chickasaws, or in the laws enacted in reference thereto, between an Indian of the full blood and one of less than the full blood. We believe, therefore, it may be asserted without fear of contradiction that the ground upon which these conveyances were assailed—that is to say, that the heirs making the same were enrolled as full bloods, or that the deceased allottee left surviving him or her, as the case may be, full blood heirs—is wholly without merit.

The first distinction made between full blood Indians, whether as allottees or heirs, and those of less than full blood, was by the Act of April 26, 1906 (34 Statutes 137), and particularly Sections 19, 20, 21, 22 and 25 of said Act.

b. Allotted Indian Lands Are Subject to Such Restrictions Upon Alienation Only as Are Imposed by Law.

We believe that lands allotted to members of an Indian tribe are subject to such restrictions upon alienation as are imposed by provisions of the allotment agreement, or by statute, and that such rule is established by the following cases:

Doe v. Wilson, 23 How. 457.

Jones v. Mehan, 175 U. S. 16.

Quinney v. Denney, 18 Wis. 510.

Strothers v. Lucas, 12 Peters 410.
Stodard v. Chambers, 2 How. (U. S.) 284.
Grignon v. Astor, 2 How. (U. S.) 319.
Marsh v. Brooks, 8 How. 223.
Landes v. Brant, 10 How. 348.
French v. Spencer, 21 How. 228.
Berthold v. McDonald, 22 How. 334.
Crewes v. Burcham, 1 Black. 352.
Challefoux v. Ducharme, 4 Wis. 554.
Ruggles v. Marcellott, 19 Wis. 173.
Stark v. Starrs, 6 Wal. 402.
Lamb v. Davenport, 18 Wal. 307.
Ryan v. Carter, 93 U. S. 78.
Elwood v. Flannagan, 104 U. S. 562.
Briggs v. Washpukqua, 37 Fed. 135.
United States v. Winona, etc., R. Co., 67 Fed. 948.
James v. Germania Iron Co., 107 Fed. 597.
Wallace v. Adams, 143 Fed. 716.
Langdeau v. Hanes, 21 Wal. 521.
Oliver v. Forbes, 17 Kan. 113.
Clark v. Lord, 20 Kan. 390.
Best v. Polk, 18 Wal. 112.
United States v. Brooks, 10 How. 442.
Dole v. Wilson, 20 Minn. 308.
Francis v. Francis, 99 N. W. 14, 203 U. S. 233.

We submit these cases without further comment as establishing this contention.

- c. *An Allottee, Before Patent, Has Full Equitable Title and May, in the Absence of Restrictions Upon Alienation, Make a Valid Conveyance Without Awaiting Delivery of Patent.*

We further submit that an allottee, upon the selection of his allotment, has a full equitable title thereto, and may make valid conveyances thereof, and when the legal title passes to him it immediately vests in his grantee. In support of this

contention, we refer to the cases cited above and to the following cases:

Jones' Admr. v. Green's Admr., 41 Ark. 363.
Kline v. Ragland, 47 Ark. 117, 14 S. W. 474.
Clark v. Hall, 19 Mich. 356.
Fisher v. Halleck, 15 N. W. 552.
Douglas v. McCoy, 5 Ohio 523.
Bernardy v. Colonial Land Co., 98 N. W. 166.
Baldwin v. Root, 40 S. W. 3.
Barr v. Gratz, 4 L. Ed. 553.
Bush v. Marshall, 6 How. 284.
Man v. Wilson, 23 How. 457.
Massey v. Papin, 24 How. 362.
Stanway v. Rubbio, 51 Cal. 41.
Nicodemus v. Young, 57 N. W. 906.
Johnson v. Newmand, 53 Texas 628.
Morrison v. Faulkner, 21 S. W. 984.
Spice v. Newberg, 37 N. W. 417.
Dunn v. Barnum, 51 Fed. 355.
Jenkins v. Collard, L. Ed., Book 36, 812.
Godfrey v. Iowa Land & Trust Co., 95 Pac. 792.
McWilliams Investment Company v. Livingston, 98 Pac. 914.

- d. *The Lands Selected in Allotment in the Name of a Deceased Allottee Under Section 22 of the Choctaw-Chickasaw Supplemental Agreement Descend to the Heirs Free From All Restrictions Upon Alienation, and the Conveyances Here Involved Are Therefore Valid, and the Bill Cannot for That Reason Be Maintained in Any Event.*

The pertinent part of Section 22 of the Choctaw-Chickasaw Supplemental Agreement, under which the lands here involved were allotted, is as follows:

"If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent

to the ratification of this agreement and before receiving his allotment of land, the lands to which such persons would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in Chapter 49 of Mansfield's Digest of the Statutes of Arkansas."

The selection of the lands to be taken in allotment are made by duly appointed administrator or executor, or, in the absence of such, by the Commission, which is required to designate "the land thus to be allotted." No mention is made in this section of restrictions upon alienation. No mention is made of the subdivision of the lands to be allotted in the name of the deceased member as a homestead and lands in excess of the homestead. For brevity, lands in excess of those selected as a homestead, under other provisions of the Agreement, will be here referred to as surplus lands. A living member applying for an allotment is required, under Section 12 of the Choctaw-Chickasaw Agreement, to designate a certain part of the lands selected by him as a homestead and a certain part as a surplus allotment. No such requirement is made of the executor or Commission in the case of the selection of lands in the name of a deceased allottee for the benefit of his heirs. Through the Arkansas Statute of Descent and Distribution, the lands so selected descend free from all restrictions upon alienation to the heirs of such allottee. There may be one or a dozen heirs; all or none of them may be members of the tribe; they may belong to any nationality or speak any language, and may consist of one or a dozen heads of families, single adults, or minor children.

Such lands may pass to the heirs so that some one of them may own an undivided one-half, one-fourth or any other smaller fractional part. A most liberal provision had been made by the Choctaw-Chickasaw Supplemental Agreement for the allotment

of lands to living members of the tribe. Evidently, Congress anticipated that the land allotted to each individual member under the agreement was ample for the support and maintenance of such allottee. When it is considered that each allottee, whether an adult or a minor, received an allotment, this conclusion becomes much more patent. When it is further considered that there was enough of the Choctaw-Chickasaw tribal lands to have given each allottee at least an additional one hundred and sixty acres, it becomes certain that those who were dealing with the members of those tribes were convinced that the lands allotted to the individual allottees were sufficient for their support and maintenance without regard to those allotted in the name of the deceased allottee, and which descended to his heirs under Section 22, above quoted, and as we contend, free from all restrictions upon alienation.

We submit that the Supplemental Agreement, insofar as it provides for the allotment of land belonging to these tribes, is naturally divided into two parts:

First—That which pertains to the allotment of land to living members of the tribes or freedmen.

Second—To allotments of land for the benefit of heirs of enrolled members of the tribes who die subsequent to the ratification of the Agreement, but "before receiving their allotment."

As to the first class, particular attention is directed to the fact that Sections 11, 12, 13, 14, 15, 16, 17 and 18 relate to the allotment of lands to *living members and freedmen*, and that they refer to the tribal lands to which they are entitled by the terms of the agreement, *as members of the tribe or as freedmen*. That is, *living members* and freedmen received the lands referred to in these sections by virtue of their status. The three hundred and twenty acres to the members of the tribe and the forty acres to the freedmen is all the land they receive by reason of that status. This land constitutes what is known

as their allotment, the title to which is conveyed to them by patents executed by the chief executive of the tribes. As *members of the tribes* and as freedmen, they are by the provisions of Sections 19, 20 and 21 prohibited from holding possession of more than three hundred and twenty acres, the allottable share of the members, and forty acres, the allottable share of the freedmen, and the allottable shares of the members of their families.

It is apparent that in Sections 11 to 21, inclusive, the agreement deals with *living members* and freedmen, by virtue of their status, and disposes of *their* allotments, working out the entire scheme as to this class of allotments before taking up allotments which descend to the heirs of the deceased members, as provided in Section 22 of the Agreement. The penal provisions of Sections 19, 20 and 21 against the holding of other lands than those allotted to living members and freedmen could not, in the nature of things, have reference to inherited lands, or lands acquired by purchase.

As stated above, Section 22 provides for an entirely different class of persons, all or none of whom may be members of the tribes, and provides a different method of selecting the allotment.

The construction herein contended for has been the unanimous construction, so far as we are advised, of this particular statute, by all of the trial courts in the Indian Territory prior to statehood, and all of the trial courts in Oklahoma since statehood, and by the Supreme Court of the State of Oklahoma. A most careful and elaborate consideration was given this statute by the Supreme Court of the State of Oklahoma in the case of *Hancock et al v. Mutual Trust Company*, 24 Okla. 391, 103 Pac. 566. This opinion presents such a clear grasp of the situation and understanding of the provision involved that we feel compelled to reproduce it practically in full. After a statement of the issues involved and after quoting the sections

of the Treaty above quoted, except Section 22, the opinion is as follows:

"It is the claim of plaintiffs, under the foregoing sections, that prior to the issuance of either a certificate of allotment or of a patent, or both, that the allottee has no title, and, that under the plain terms of the enactment, he is not permitted to alienate any of his lands prior to the date of the patent, and the argument is made that the limitation contained in the foregoing sections not only applies to the living members of the tribe, but that it is equally applicable to the heirs of the deceased members; that is, those whose names appeared upon the rolls and who died subsequent to the ratification of the agreement and before receiving their allotments."

Section 22 of the same Treaty provides as follows:

"If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this Agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in Chapter 49 of Mansfield's Digest of the Statutes of Arkansas. *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted."

To our minds, the sections of the Treaty which touch upon the subject naturally fall into three divisions, to-wit: The provisions included in the sections which we have first above noted, being sections from 11 to 16, inclusive, which particular

sections relate to the living people who would personally participate in the disposition of the lands and properties of the tribes; and, second, those subdivisions embraced in the three sections, 19, 20 and 21, which relate to criminal offenses carved out of violations of the different portions of the Treaty, and which fix the punishment therefor, and it is to be noted that not until both of these classes or elements are provided for, and the subjects therein dealt with concluded, that we find the treaty dealing with the third subdivision, which relates solely to the lands and property of those who were not in being at the time the allotment was made, who are provided for in Section 22.

The general purpose of the entire Act is easily gathered from its history and terms. The Congress of the United States and the members of the different tribes clearly foresaw that the increasing pressure of white people surrounding those nations, crowding over and intermingling with them, rendered a further continuance of their qualified tribal independence of the Government of the United States not only impracticable and probably impossible of accomplishment, but also that the friction occasioned by an effort to continue it would work to the detriment of all parties. Out of this situation grew the conviction that it would be wiser and more conducive to the best interests of all to divide the national wealth among the children of the tribes who were then living and among the heirs of those whose names were upon the roll on a day certain. When this was done and each had received his portion, then would come a dissolution of the ties which had bound them together as a government, and each with his patrimony would go his separate way. Under the old regime when a member of the Nation died, his interest in the property of the Nation went back to the entire body of the people, but this was not to be under the Treaty into which they entered and which is now before us. For, under it, a roll of the

membership of the Nation and those who were entitled to participate in its assets was provided for. Recognition of the general inability of the individual members to at once successfully cope in a business way with many of the people among and surrounding them was taken by providing that all of those who were living and who, under the Treaty, personally took their allotments, were held by virtue of the terms of the Act to be restricted in their right of alienation, and to take the land subject to this restriction. This condition and the reason for it are well stated in the case of *Jackson v. Thompson et al*, 38 Wash. 282, 80 Pac. 454, wherein the Supreme Court of that state, speaking through Mr. Justice Dunbar, said:

"The Indians are wards of the Government. These arrangements and provisions are provisions in their interest and by their consent, as indicated in the solemn treaties executed. The Government, from the necessities of the case, in consideration of the inexperience of the Indians, was compelled to insert these provisions in deeds which it issued to them, to prevent them from becoming the prey of sharpers and speculators, who would, for an insufficient consideration, obtain their lands; the ultimate result being that the Indians would become pensioners upon the Government; and the mutual interests of the Indians and the Government demanded some such regulations."

And the same policy was likewise recognized by the Circuit Court of Appeals of the Eighth Circuit in the case of *Beck v. Flournoy Live Stock & Real Estate Company*, 65 Fed. 30, 12 C. C. A. 497-501, wherein Justice Thayer, who prepared the opinion for the court, said:

"These limitations upon the power of the Indians to sell or make contracts respecting land that might be set apart to them for the individual use and benefit, were imposed to protect them from the greed and superior intelligence of the white man. Congress well knew that if

these wards of the Nation were placed in possession of real estate, and were given capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their several holdings; and that, instead of adopting the customs and habits of civilized life and becoming self-supporting, they would speedily waste their substance, and very likely become paupers. The motive that actuated the lawmaker in depriving the Indians of the power of alienation is so obvious, and the language of the statute in that behalf is so plain, as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians."

The foregoing discussions are equally applicable to the people who were required to act under the treaty in question, and the necessity for their protection mentioned by the courts in the cases which we have noticed was recognized by Congress and the representatives of the tribes in the preparation of this treaty. Three hundred and twenty, or even one hundred and sixty acres of land of the character referred to in this treaty and embraced within these nations is, in this country, a munificent competency. It is sufficient to abundantly protect every possessor of it should he retain it, as long as he lives, and to leave a bountiful legacy to those who come after him. A citizen of this Nation with such a possession and resource would never need feel want or distress; he would not become a charge or a subject of charity; but the reasons which prompted the lawmakers to protect him in this holding were altogether wanting when it came to the question of protecting those whose names were on the roll but who died before receiving an allotment. If the heirs of those people were members of the tribe, they, in their own allotments, were amply provided for. If the heirs of those people were not members of the tribe, there existed no necessity, occasion, or policy requiring any restriction on the sale of their lands.

The conclusion reached, based on the foregoing observations, which in a way relate generally to the policy of the law as gathered from it and the conditions surrounding its adoption, rather than to its specific terms, are in our judgment fully sustained when the exact literal language of the statute is scanned and weighed.

Section 27 provides for the making of rolls of the Choctaw and Chickasaw citizens, and the Choctaw and Chickasaw freedmen, by the Commission to the Five Civilized Tribes, and Section 28 provides that the names of all persons living on the date of the final ratification of the Agreement, entitled to be enrolled, shall be placed upon the rolls made by the Commission, and that no person intermarried thereafter to a citizen shall be entitled to enrollment or participation in the property of the tribe. In these sections, then, there is fixed absolutely (except a class not necessary to here notice) the identity of the persons among whom the property of the tribe is to be parceled or apportioned. By Section 11, as is seen, it is provided that there shall be allotted to each member of the tribe after the enrollment just noticed, land equal in value to three hundred and twenty acres of average allottable land, and to each freedman whose name appeared on the rolls provided for, forty acres of the same character of land. In reference to the land of the members, Section 12 provides that at the time of the selection of his allotment, each member shall designate as a homestead, land equal in value to one hundred sixty acres, and on the alienation of this land there is placed this specific restriction: That it shall not be alienated during the lifetime of the allottee, which limitation, however, is modified by the further provision that this shall not continue longer than twenty-one years from the date of the certificate. So that, to our minds, from the language, it is clear that if the member with his designated homestead lives so long as twenty-one years from the date of the certificate, that during that

period he cannot lawfully sell this portion of his allotment, but to us it appears equally clear that should he die, even the next day after receiving his certificate to his homestead allotment, that his heirs then (so far as this Act is concerned) might sell the same free from any restriction on its alienation. Section 13 sets forth the restriction which exists upon the alienation by a freedman of the land which he receives under this treaty, and it is to be noted that the language contained in Section 12, relating to the restriction on alienation by a member of his homestead allotment, is identical in terms with the language used in Section 13 relating to the restriction upon the alienation of land allotted to the freedmen. In each of them it is provided that the same "shall be unalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment." To each of these allottees, then, is the same law, with reference to alienation, made applicable. His death would remove this restriction from the alienation of the land by his heirs, and a lapse of twenty-one years would remove it as to himself. Now, if the heirs of a member of the tribe as to his homestead and the heirs of a freedman may sell the lands allotted to their ancestor immediately on his death, what possible reason can be assigned, or where is the language in the Act which would preclude an immediate alienation by the heirs of those persons (which word includes members, citizens and freedmen) provided for under Section 22, who never, in fact, selected their allotments, but whose allotments were selected solely for the benefit of and in the interest of the heirs? To our minds, both are wholly wanting. Nor, in our judgment, is this construction in any wise modified or limited by the terms of Sections 15 and 16. To our minds, it is reasonable to say and hold that lands or other property coming to an individual, either by descent or purchase, comes to him with no restriction upon his right to dispose of them, except the specific restriction with which their

title is, by clear terms, burdened. This rule we think applicable to the lands which are granted to these people under this treaty. If there is no specific language fixing a restriction, and no language from which an implication thereof may be plainly derived, then, in our judgment, none ought to be held to exist. Section 15 provides generally against the incumbrances of lands allotted to members and freedmen, by any deed, debt or obligation prior to the time when the land can be alienated, which would necessarily carry with it the converse of the proposition: that these lands could be incumbered after the time at which they could be alienated. The last clause of this section provides that, "Nor shall said lands be sold except as herein provided." Section 16 immediately following, to our minds, has specific reference to the clause which we have just quoted, for it provides that, except the homestead, all lands allotted to the members of the tribes may be alienated in certain proportions in one, three and five years after the date of patent. The proviso contained in that section is: "That *such* land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal government for less than its appraised value." The first portion of this section, in our judgment, relates solely to the surplus lands, and not to the homestead, of living members, and the proviso relates solely to the price to be received and in no other way restricts or modifies the section. The practice under the requirements of the treaty, as is shown by the record in this case, seems to have been to separate the lands of the members of the tribe into homestead and surplus, even where these members were persons who came within the provisions of Section 22, and who, in fact, were dead, and to whom the word "homestead," in its generally accepted use, could in no wise apply. The question of whether or not the restrictions contained in Section 16 providing for the sale of the surplus lands allotted to members in one, three

and five years, to be made only after the expiration of such periods *from the date of patent*, referred to the surplus taken by the members who were included in the term "persons" of Section 22, presents a proposition of perhaps a little greater difficulty than any other in the case. Several considerations prompt us to hold, however, that the limitation referred to does not apply to this land. First, it will be noted that the section under consideration falls within that portion of the Act where the scheme for the taking, holding and disposing of the property of living persons is worked out, and it seems to us that this particular section was made without even a remote reference to Section 22, or the land taken thereunder, but solely with reference to its own terms, and to the sections of the Act which had preceded it, and, as we have heretofore seen, the heirs of a deceased enrolled freedman could immediately sell his land without any restriction, and the homestead of a deceased member could at once be sold by his heirs. In view of these considerations, then, it seems to us that it would be irrational and absurd to hold that the surplus would bar a restriction. To say so would be to hold that a homestead which could not be sold for twenty-one years, if the allottee lived, was free and clear in the hands of the heirs; while the surplus, which the allottee could sell in one, three and five years, would, in the hands of the same heirs, still carry this limitation upon a right to sell. Another thought which leads us to this same conclusion is that Section 22 provides for the allotment in the name of the deceased person, whose name was on the rolls, of the land to which he would have been entitled, which, with his share of the other property, descended to his heirs, not under any tribal or federal act containing recognition of the terms of this treaty, but it is provided that the heirs shall take under the terms of a separate and specific statute, to-wit, the laws of descent and distribution as provided in Chapter 49 of Mansfield's Digest of the Statutes of Arkansas.

These laws contain no restriction on alienation, and, the rights of the heirs under them being recognized by this treaty, carried the property to them free, clear and unincumbered.

Furthermore, as we have seen, it cannot be said there is, within the language of the section itself, any specific restriction, and restrictions on the alienation of real property ought not to fasten their grip on it by implication unless there are words in the Act which would seem to plainly require it. Where the reason of the rule fails, and there is no affirmative language to sustain it, certainly the rule ought to go with it. The application of particular provisions of a statute is not to be extended beyond its general scope and object, unless such extension is manifestly designed. (*Estate of Benjah Ticknor*, 13 Mich. 44.)

The heirs, in the absence of a will, were entitled to the decedent's property immediately upon his death. In the case at bar, it is true no certificate or patent had issued, but as Mr. Justice Field said in the case of *Stark v. Starrs*, 6 Wall. 418:

"The right to a patent, once vested, is treated by the Government when dealing with the public lands as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants."

Other authorities which have been examined and found helpful to us in the consideration of this question are: *Indian Land & Trust Company v. Fears et al*, 98 Pac., (Okla.) 904; *Clark v. Lord et al*, 20 Kan. 390; *Farrington v. Wilson et al*, 29 Wis. 383; *Shulthis v. MacDougal*, 162 Fed. 331; *Jones v. Meehan*, 175 U. S. 1.

From the foregoing it will be seen, we conclude, the lower court did not err in holding that lands allotted (homestead

and surplus) under the provisions of Section 22, Chapter 1362, 32 Statutes at Large, p. 641, approved July 1, 1902, in the name of a deceased member of the Choctaw Tribe of Indians, are alienable by his heirs after lawful selection, prior to the lapse of one, three or five years, and prior to the issuance of certificate or patent, and the judgment is accordingly affirmed.

Kane, C. J., and Turner, J., concur; Williams and Hayes, J. J., not sitting or participating.

In support of the conclusion that the above decision of the Supreme Court of Oklahoma is correct, reference is hereby made to the authorities quoted above under the sub-title, "*Allotted Indian lands are subject to restrictions upon alienation only as are imposed by law.*"

Particular attention is called to the fact that under the provisions of the Agreement now under consideration, the only instance in which the word "heirs" is used in connection with the restrictions upon alienation is in Section 16, which *authorizes* a sale of the surplus lands allotted to a living member, one, three and five years after date of patent, and provides that such lands shall not be alienable by the allottee or his heirs before the expiration of the Choctaw and Chickasaw Tribal Government for less than the appraised value. The only restriction imposed upon the heir of an allottee to whom land is allotted is that he shall not alienate his lands before the dissolution of the tribal government for less than the appraised value.

The specification of restriction against the sale for "less than the appraised value" seems to us to impliedly exclude any other restrictions and reinforces our contention that the other restrictions do not apply to those who inherited lands from persons who died before receiving their allotments, and if the heirs get the appraised value thereof, as fixed by the

Department of the Interior, they may sell it. In almost every Indian treaty, agreement or statute there is found a provision against alienation by heirs as well as by the allottee. Under the Choctaw-Chickasaw Supplemental Agreement, no restrictions were imposed upon alienation of lands allotted in the *name of deceased members*. In dealing with lands allotted to members, the provisions imposing restrictions upon alienation are made applicable to the heirs in one case only, and that is, that the heir may not sell the inherited surplus allotted to a living member for less than the appraised value during the existence of the tribal government.

It is, therefore, respectfully submitted that the lands involved in this controversy were, at the time that they were conveyed, alienable without restrictions; that such lands being alienable, the conveyances assailed are not subject to revocation and that the judgment of the trial court is correct when applied to the merits of the controversy. We, therefore, submit that the judgment of the Circuit Court of Appeals should be reversed and that of the trial court affirmed.

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

J. S. MULLEN AND W. B. JANSEN, appellants, v. THE UNITED STATES.	} No. 404.
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ALFRED F. GOAT ET AL., APPELLANTS, v. THE UNITED STATES.	} No. 405.
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THE DEMING INVESTMENT COMPANY, appellant, v. THE UNITED STATES.	} No. 434.
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P. E. HECKMAN AND ROBERT L. OWEN, appellants, v. THE UNITED STATES.	} No. 496.
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APPEALS FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

GENERAL, BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

At intervals between the 14th of July, 1908, and
October 12, 1909, the United States, by its Attorney



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General, upon the recommendation of the Secretary of the Interior, filed in the United States Circuit Court for the Eastern District of Oklahoma 301 bills in equity against some 16,000 defendants, to cancel some 30,000 conveyances, made by as many or more grantors, members of the Five Civilized Tribes, of the allotted lands of those tribes, as having been made in violation of existing restrictions upon the power of alienation by the Indian owners. Discovery was sought, for the purpose of cancellation, of conveyances and encumbrances of the same lands, if any existed other than those described in the bills, and restoration of the possession of the lands to the Indian owners was prayed.

The cases were brought from time to time as information of the conveyances was acquired. The selection and grouping of defendants in each case was determined by the substantial identity of the facts and propositions of law upon which the question of alienability of the land was dependent, and the 301 cases may in this respect be assembled in 15 groups.

Demurrers were filed in the Circuit Court to 125 of the bills, challenging the right of the United States to maintain the suits as brought and also each case upon its merits as not showing the land involved to be under restriction.

The demurrers were sustained upon the grounds that—

1. The United States had no interest in the subject matter of the litigation;

2. The Indian grantors were necessary parties complainant; and

3. The bills were multifarious.

The bill in each of the 125 cases was ordered dismissed. Whether or not the lands were alienable was not determined in any case.

The cases thus passed upon were all taken to the Circuit Court of Appeals for the Eighth Circuit, where 17 were selected as typical of all and presented for determination.

The Court of Appeals considered only the questions passed upon by the Circuit Court and, reaching a contrary conclusion, reversed the decrees of the Circuit Court and remanded the cases, with directions to proceed in them conformably to the views expressed in the opinion.

The cases in the Court of Appeals, except the 17 which had been selected for presentation, were in fact remanded, and of the 17, the 4 above entitled were brought here by appeal. The 13 cases remaining in the Court of Appeals and the 284 in the Circuit Court are held in abeyance, awaiting the decision of this court in the 4 cases pending here.

The question of the right of the United States to maintain the suit as brought is common to all the cases, and believing that the convenience of the court will be served thereby, we present that in a general brief entitled in all the cases, and deal with the cases separately as to the question of alienation.

In discussing the general question it is not necessary to consider more than one case, and we take

for that purpose the first in order—No. 404, *Mullen and Jansen v. The United States*. All references will be to the printed record in that case.

The Indians concerned in this case are all Choctaws of full blood, and the lands are allotted lands of the Choctaw Tribe, held not by virtue of original allotment, but by inheritance from the original allottees.

There are a hundred and one defendants in this case and more than that number of conveyances involved, and more than that number of Indian grantors concerned. To avoid needlessly encumbering the printed record, the description of only four of the conveyances is set out therein.

The bill

in its first and second paragraphs makes various allegations respecting the relations of the United States to the Indians in support of its right and duty to maintain the suit, and as the grounds of suit in the particular case alleges (R., 5, 6):

Third.

Your orator further shows that in the exercise of its powers so to regulate, control, and govern the affairs of the said Choctaw tribe of Indians and the members thereof, having in view the welfare of the said Indians and the carrying out of its treaty obligations, the Congress of the United States, by an act approved July 1, 1902, the same being found in 32 Statutes at Large, page

641, provided that the land belonging to the said Choctaw tribe of Indians in the present State of Oklahoma should be allotted in severalty among the members thereof, but deeming the said Indians to be untutored and improvident and still requiring the protection and supervision of the General Government, it was provided by the said Act of July 1, 1902, that the portion of the lands so allotted to the members of the said tribe as homesteads should be inalienable, and further, that the lands other than homesteads allotted to the members of the said tribe should be alienable only in five years after the issuance of patent to the allottee, and not before such time, and that, in accordance with the provisions thereof, the said Act of Congress was fully accepted and ratified by the Choctaw people on September 25, 1902.

Fourth.

Your orator further shows that all of the tracts of land hereinafter described are situated in the Eastern District of Oklahoma, and was land of the Choctaw tribe; and was, at the time of the execution and recording of the deeds and other instruments of writing set forth in paragraph number 6 hereof, allotted lands of the Choctaw tribe, which had been inherited by full blood Indians of said tribe, namely: The persons mentioned in paragraph six as granting or transferring the same; that the law at the time in force forbade the conveyance of lands of such full

blood heirs without the approval of the Secretary of the Interior; that such approval was never, and has never been, obtained to the transactions set forth in paragraph six; that the laws relating to the restrictions upon the sales of lands of the Five Civilized Tribes are public laws, and put the defendants upon inquiry and notice of all the matters set forth in this paragraph; that defendants were advised by the appearance of their grantors that they were such full blood Indians, or put upon inquiry so as to be chargeable with notice of the fact; and moreover, the matters set forth in this paragraph are notorious and of common knowledge.

Fifth.

Your orator further shows that each of the deeds, mortgages, leases, contracts of sale, powers of attorney, and other evidence of title to or incumbrance upon tracts of land as hereinafter set forth, was secured by defendants in defiant, wilful and open violation of law, for the purpose of unlawfully incumbering the lands described in paragraph numbered four above.

And your orator further shows that by filing four records and causing to be recorded the said deeds and other instruments of writing, each of the defendants herein named has unlawfully obtained for himself an apparent title or interest of record to the land hereinbefore described, all of which was done in defiance of said agency, supervision, and in open violation and contempt of the

laws of the United States, to the great detriment, irreparable injury and loss of said Indians, and in direct interference with the supervision and control of the Government of the United States in that behalf.

There follows a description of the different conveyances which it is sought to set aside (R., 7-9), and the bill then alleges the existence of other conveyances and encumbrances, not described because they have not been recorded, and that the defendants announce and threaten that they will continue to get from the Indians named and others of the Choctaw Tribe other and further conveyances of lands which are by law restricted as to alienation, to the great embarrassment of the United States in the execution of its Indian policy and in the discharge of its duty to its Indian wards. (R., 9, 10.)

The joinder of the different defendants and the different transactions in the one suit is justified by the bill upon the ground that the questions of law and fact affecting the validity of the conveyances assailed are as to each conveyance substantially the same. (R., 10.)

There is as between the several Indian grantors concerned in the case no community of interest save that they are full-blood members of the same tribe, and are as to the lands here involved heirs and not original allottees, and so are subject to the same restrictions. As between the different defendants there is no community of interest other

than that the deeds under which they severally claim depend for their validity upon the same questions of law and fact. No relief is asked on the ground of specific fraud in any case, or on the ground of inadequacy of consideration, and the transactions are not individualized in that respect. In all of the transactions, and so it is as to all the other cases, the conveyance is assailed as illegal and charged to be void, because in contravention of restrictions upon alienation imposed by the United States in the course of its Indian policy and in discharge of its duty to its Indian wards.

The opinion of the Circuit Court may be found in the record, pages 18 to 41, and reported as *United States v. Allen* (171 Fed. Rep., 907). The opinion of the Circuit Court of Appeals may be found in the record, pages 49 to 57, and reported as *United States v. Allen* (179 Fed. Rep., 13).

PROPOSITIONS AND AUTHORITIES.

I.

The United States may by suit in equity enforce the restrictions imposed by it upon the alienation of allotted tribal lands by members of the Indian tribes.

Marchie Tiger v. Western Investment Co.,
221 U. S., 286.

United States v. Allen, 179 Fed. Rep., 13.

Conley v. Ballinger, 216 U. S., 84.

United States v. Kagama, 118 U. S., 375.

Worcester v. Georgia, 6 Peters, 515.

In re Debs, 158 U. S., 564.

United States v. Am. Bell Tel. Co., 128 U. S., 315.

United States v. San Jacinto Tin Co., 125 U. S., 273.

United States v. Rickert, 188 U. S., 432.

In the matter of Heff, 197 U. S., 488.

Beck v. Flournoy Live Stock Co., 65 Fed. Rep., 30.

United States v. Flournoy Live Stock, etc., Co., 69 Fed. Rep., 886.

Pilgrim v. Beck, 69 Fed. Rep., 895.

United States v. Flournoy, etc., Co., 71 Fed. Rep., 576.

Rainbow v. Young, 161 Fed. Rep., 835.

II.

The Indian allottees are not necessary parties to such a suit, as the United States has rights and interests of its own to conserve and is, moreover, under obligation to protect the Indians in those restrictions.

United States v. Allen, 179 Fed. Rep., 13.

United States v. Am. Bell Tel. Co., 128 U. S., 315.

United States v. San Jacinto Tin Co., 125 U. S., 273.

United States v. Hammers, 221 U. S., 220.

Marchie Tiger v. Western Investment Co., 221 U. S., 286.

United States v. Trinidad Coal Co., 137 U. S., 160.

Pilgrim v. Beck, 69 Fed. Rep., 895.

III.

The bill is not multifarious for it joins only such transactions as depend for their validity or invalidity upon the same state of facts and the same propositions of law.

Story on Equity Pleading, 14th ed., sec. 539.

Jennison's Chancery Practice, 26.

Hale v. Allinson, 188 U. S., 56.

Ill. Cent. R. R. Co. v. Caffrey, 128 Fed. Rep., 770.

Bitterman v. L. & N. R. R. Co., 207 U. S., 205.

ARGUMENT.

I.

In this discussion we assume that there were, as alleged in the bill, restrictions, which had been imposed by the United States upon the alienation of inherited allotted tribal lands by Choctaw Indians of the full blood at the time the conveyances were made.

We shall endeavor to show that these restrictions are legal and binding; that the United States has the right to enforce them; and that a suit in equity by the United States in which only such transactions are joined as depend upon the same facts and the same propositions of law for their validity, and the decision as to each and all of which must be the same, is an orderly judicial method of enforcing that right.

It is pertinent at the outset to observe that if separate suits are to be brought, because the property interests of the individual grantors and grantees are separate, there must be in the case of the Choctaws alone, as to matters so far brought to light, more than 9,000 suits, and in the case of the Five Civilized Tribes more than 30,000 suits must be instituted. It is enough to simply suggest the enormous labor and expense that would be entailed by separate suits, and it is obvious that their very number would make them fail of their purpose.

If like transactions may be joined, 15 cases will be determinative of all the transactions that have been disclosed or may hereafter be brought to light.

The number and nature of the transactions demonstrate that this litigation is of more than individual interest and that national policy is involved, and only by the assertion of its right can the United States secure observance of the policy which it has prescribed for this great body of its Indian wards.

The recent decision by this court in the case of *Marchie Tiger v. Western Investment Co.* (221 U. S., 286) greatly simplifies the work of presenting this case. It makes it unnecessary here to review comprehensively the history of the dealing of the Government with its Indian peoples as disclosed by treaties, statutes, and judicial decisions; and several propositions, vital to this case, were there definitely determined. That case settles beyond the necessity for discussion here that Con-

gress, and Congress alone, may determine when, in the interest of the Indian, Government guardianship over him shall cease; that neither the allotment of lands in severalty nor the grant of citizenship to the Indian terminates that guardianship; that consistently with allotment in severalty and the grant of citizenship Congress may restrict the alienation of land by the Indian; that the imposition of such restriction is a continuation of guardianship by the Government, and that a conveyance of land in disregard of such restriction is invalid.

To appreciate the full force and effect of the *Marchie Tiger* decision it must be borne in mind that the land had been allotted to Tiger subject to restriction upon alienation by him; that citizenship had been conferred upon him; that thereafter Congress extended the period of restriction beyond the time originally prescribed; and that this extension of the period of restriction was sustained as valid.

It is settled, then, for this case, that if at the time of the conveyances in question there were restrictions imposed by Congress upon the alienation of the land, those restrictions were valid and the conveyances were invalid.

Marchie Tiger sued for himself; and must every Indian who has parted with his land in contravention of the providence of the Government in his behalf do the same, or may the Government by its own action enforce what it has declared the welfare of the Indian requires?

The right and the duty of the Government to maintain this suit is not based upon any interest of the Government in the land itself. We make no question as to the quality of the Indian title. We do not dispute that he holds in fee simple, but the quality of his title is absolutely without relevancy to the present question. As to this, it was well said by the Court of Appeals in one of these cases, *United States v. Allen* (179 Fed Rep., 13, 16):

* * * the plan of the government, in dissolving the five civilized nations and distributing their lands in severalty, was not simply a real estate transaction. It was a great governmental project, having for its object the social and industrial elevation of the Indians. For the accomplishment of that result there were two main reliances: (1) The added incentive which comes from the individual ownership of property as distinguished from its joint or tribal ownership; (2) the continuance of that ownership for such a period as should bring the Indian into a state where he could safely be trusted to protect his interests in the sharp competition with members of the white race. During all the years that this scheme was in process of execution, the Indian lands, like the Indians themselves, were subject to the supreme authority of the national government. The United States proceeded, in so far as it could, with the consent of the Indians. That, however, it did as a matter of wise governmental policy, and not in obedi-

ence to any constitutional restriction. Whenever it encountered the obstinate opposition of the Indians to its plans, it did not hesitate to set aside their will and substitute its own authority. The title to these lands was in the Indian tribes, and the formal conveyances to the individual members were made by tribal officers. All this, however, was done in obedience to the regulations of the national government. To attempt to cramp these large governmental measures to the narrow limits of a real estate transaction is to deprive them of their distinctive character. And yet much of the argument contained in the briefs, as well as the opinion of the trial court, treats these measures as a matter between grantor and grantee, and, wherever they do not fit the private law of real property, they are declared to be ineffective.

The land was given to the Indian not simply with the caution or admonition not to part with it during the time or except under the advice and consent prescribed, but with that caution and admonition made mandatory upon him and all others, and so made in the interest of the Indian and in the interest of the general welfare as well. And the 30,000 conveyances involved in these suits show how idle mere admonition would be. The purpose of the Government was that after a period of training in the relations of civilized life the Indian should be turned free to grapple with its problems, not as a helpless pauper, but with an endowment of

property to compensate in some measure for his limited experience. The Government is interested that this purpose be not defeated.

And this case is not to be determined by the principles of our law of guardian and ward. Here again the Court of Appeals spoke to the purpose in the *Allen* case cited above. Following the quotation already made, the court said:

The same observations may be made as to the statement of the relation between the national government and the Indians being that of guardian and ward. These are familiar terms in decisions dealing with Indian matters. They are, however, words of illustration, and not of definition, and to attempt to reason from the private law of guardian and ward to the measures of the federal government in dealing with the Five Civilized Tribes leads only to confusion and the subversion of the real scheme of government.

In the private law of guardian and ward the rights of the ward are vested and fixed beyond the power of the guardian to change, and the duties of the guardian are in like manner fixed and prescribed.

It is not so in the relations of the Indian and the Government. From the beginning, whether it was by treaty or by statute, the Government in fact determined the rights of the Indian and its own powers and duties. It is presumed to have acted for his welfare, but it at all times held itself free to determine what that welfare required. The Indian

acquired no vested rights in the terms and provisions of any treaty or statute. As Mr. Justice Holmes said in *Conley v. Ballinger* (216 U. S., 84, 90), "the United States * * * was bound itself only by honor, not by law." Any promises that it made "rested for their fulfilment on the good faith of the United States—a good faith that would not be broken by a change believed by Congress to be for the welfare of the Indians" (p. 91).

A power so broad as this implies a corresponding duty. And so this court has determined. In *United States v. Kagama* (118 U. S., 375, 384) the court said:

* * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

The restriction upon alienation was not imposed as an impairment or debasement of the title by which an Indian allottee held his land. The land was granted to him in fee simple, but it was insisted that he should hold it for a prescribed time or part with it only under certain conditions of precaution for his welfare. The restriction does not enter into the title to the land and affect its quality, but is personal in its nature. It is a meas-

ure of care for the Indian individually. Counsel speak of it as an infringement of his rights. Of the 30,000 Indians concerned in this litigation, not one complains that his rights have been impaired. The restriction upon alienation is simply a limitation upon the powers and responsibilities ordinarily incident to the ownership of property. The right of the Indian in and to his land is full and complete; his power over it, his power to divest himself of it, is restricted, because he is not yet deemed fitted for the exercise of that power. But that power is no more his right than playing with a sharp knife, to which it is attracted by the gleaming blade, is a right of the child.

The wardship of our domestic law was not established because of any racial alienage or inferiority. The wards are members of our own households, people of our own blood. The guardian must preserve the rights of his ward as they are prescribed by law and may at any time be called to account for neglect of his duties or abuse of his powers. The ward is at all times a favorite of the law, and if we have not provided that the State may sue in his behalf, we have yet made ample provision otherwise for the security of his interests.

The Indian is an alien and a stranger in the land in which he was born and in which he must live to the end of his days. The laws to which he is subject were not of his making, nor yet of the making of his fathers. He is a ward without a guardian

whom he can hold to account for either neglect or wrongdoing. He must look to the white man's government for protection, "rely on its kindness and power, appeal to it for relief to his wants, and address the President as his great father." (Marshall, Ch. J., in *Worcester v. Georgia*, 6 Peters, 515).

These suits are brought in manifestation of that kindness and in exercise of that power. The right to impose the restrictions has as its correlative the obligation to enforce them. For the protection of the trust which the Government has assumed it may as well as any private guardian appeal to its courts. In the case of *In re Debs* (158 U. S., 564, l. c. 584) the court said:

Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrong doing of one resulting in the injury of the general welfare, is often of itself sufficient to give it a standing in court. This proposition in some of its relations has heretofore received the sanction of this court. In *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 285, was presented an application

of the United States to cancel and annul a patent for land on the ground that it was obtained by fraud or mistake. The right of the United States to maintain such a suit was affirmed though it was held that if the controversy was really one only between individuals in respect to their claims to property the government ought not to be permitted to interfere, the court saying: "If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.

In the case of *United States v. American Bell Telephone Co.* (128 U. S., 315, l. c. 367) this court, by Mr. Justice Miller, after quoting the above language from the *San Jacinto Tin Co.* case, says:

This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States

to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual.

In the cases before the court there appears not only an interest of the Government in the enforcement of the laws it has made for the protection of these Indians in the possession of their lands, but as well a solemn obligation to conserve the welfare of a large number of persons who have always been in a peculiar way the objects of the Government's concern.

In *United States v. Rickert* (188 U. S., 432) the lands had been allotted to the Indians, but the legal title was held in trust for them by the United States. The State of South Dakota attempted to tax the lands while they were thus held, and suit was brought by the Government to enjoin the assessment and collection of the taxes. Sustaining the action of the Government, the court said p. 443):

* * * The Government would not adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract and failed to exercise any power it possessed to protect them in the possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them.

And in the *Matter of Heff* (197 U. S., 488, l. e. 509) the court said:

* * * Undoubtedly an allottee can enforce his right to an interest to the tribal or other property (for that right is expressly granted) *and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a National or a state court.*

The series of cases involving the Flournoy Live Stock & Real Estate Co. (65 Fed. Rep., 30, and 69 Fed. Rep., 886) is interesting in this connection.

In 1863 the Winnebago Tribe of Indians was removed to a new reservation, pursuant to an act of Congress which provided that the Secretary of the Interior might allot lands in severalty to the individual members of the tribe, which should be vested in such individuals and their heirs "without the right of alienation." Some allotments were made under this act by patents containing this restriction. In 1887 another act of Congress made

further provision for allotment of lands to the Indians in severalty, such lands to be held in trust for the Indians and their heirs by the United States for 25 years, any conveyance of or contract touching such lands being declared null and void. The same act provided that Indians so receiving the lands in severalty should thereby become citizens of the United States and entitled to all of the rights of such citizens. A large amount of land was allotted under this act. The Flournoy Co., without the sanction of the Commissioner of Indian Affairs, obtained leases from the allottees to the number of about 37,000 acres of lands allotted under both acts. Upon learning this fact, the commissioner directed the Indian agent to notify such lessee that the leases were void and would not be recognized by the Government, and that the lands must be vacated by a day certain, which the agent proceeded to do.

In the first of the cases the Flournoy Live Stock & Real Estate Co. sought to restrain William H. Beck, who was acting Indian agent, from interfering with the possession of the lands they had obtained under the leases. Beck, in pursuance of the direction of the Commissioner of Indian Affairs, had served notice on all holders of leases that they were void and that the premises must be vacated within a certain time. Beck was enjoined by the trial court, and the case was taken to the Circuit Court of Appeals for the Eighth Circuit. (65 Fed. Rep., 30.) That court reversed the trial court and held, in an opinion by Judge Thayer, that restric-

tions against alienation were imposed by the act of 1863 and the general-allotment act; that the courts would not assist any wrongdoer taking property in violation of an act of Congress, in retaining possession of the same as against the efforts of the Government to oust the wrongdoer from such possession, and that the grant of citizenship is not inconsistent with provisions prohibiting alienation.

The next case was *The United States v. The Flournoy Live Stock & Real Estate Co. et al.* (69 Fed. Rep., 886).

In this the United States sought the aid of the court to obtain the cancellation of the illegal leases, to recover possession of the lands so leased, and to restrain the defendants from dealings of a similar nature with the Indians. The Flournoy Co. and all other persons who had obtained similar leases from the Indians were made defendants to the number of 231. The similarity of the demurrers to those in the cases at bar is striking. They were:

1. That the plaintiff had a full and adequate remedy at law.

2. That the bill was multifarious in that it was exhibited against a number of defendants for several distinct and independent matters.

3. That the allegations of the bill did not show the plaintiff entitled to the relief sought.

The court held:

1. That the leases were void.

2. That equity had jurisdiction of a suit by the United States against persons illegally securing

leases of Indian lands and retaining possession thereunder, since remedy by ejectment, even if such a remedy existed, would be inadequate.

3. That the bill was not multifarious.

At page 890 the court said:

* * * The theory of the bill is that the United States is a trustee for the Indians, and holds the title of the lands in trust for them, and by force of the treaties with them, is charged with the performance of certain duties towards them, and that there exists a trust relation of a high and delicate character, and that, for the proper performance of these trust duties, it is necessary that the defendants should not only be ousted from the possession of the leased lands, but that the defendants should be restrained from inducing the Indians to make further leases of any portion of the reservation, and from interfering with the Indian agent in the performance of his duties. The bill seeks the aid of the court, as a court of equity to assist in the proper performance of trust duties and obligations, and to protect the rights of the Indians, and the relief sought to that end is not available in an action at law; and therefore it cannot be held that the equitable jurisdiction is barred because of the existence of an adequate remedy at law.

The case of *Pilgrim et al. v. Beck et al.* (69 Fed. Rep., 895) was similar to the case of *Beck v. Flournoy Live Stock & Real Estate Co.* and was decided the same way. The case of the *United States v.*

Flournoy Live Stock & Real Estate Co. (71 Fed. Rep., 576) was the last in this series of cases and was the same case as that in 69th Federal Reporter, 886, in which the demurrers were overruled and here heard on bill and answer. Judge Shiras held (p. 579) as follows:

* * * I hold that the fact that the Indian allottees are declared to be citizens of the United States does not render null and void as to them, or as to the remaining portion of the Omaha and Winnebago Tribes, the restrictions upon the right of alienation contained in the several acts of Congress under which allotments in severalty have been made of portions of these reservations. * * *

I further hold that these reservations continue to be Indian reservations; that the United States has never yet been released from the treaty stipulations and obligations by which it assumed to preserve these lands for the use and benefit of the Indians; that the United States holds the title of these lands charged with the trust *created by the treaties* in question, and it is its duty to do whatever is necessary to protect the Indians in the proper use and occupancy thereof; that the power and right in the United States to do whatever is necessary for the fulfillment of its treaty duties, trusts, and obligations towards the Indians rests upon every foot of soil and upon every individual within the boundaries of the reservations, and this power and right is para-

mount and supreme. * * * I further hold that the United States has the right to invoke the aid of the court to remove defendants from the possession of the lands in the bill described, and also to restrain them from procuring the execution of other leases.

A careful examination of this series of cases shows that no distinction is made by the court between the lands the title to which had vested with restrictions imposed against alienation and those allotted under a trust patent, and that the conclusions reached are not based on any property right in the United States under a reserved trust, but upon its peculiar relationship to the Indian, resulting from its long-established policy and the *terms of the treaties made*, and that if the United States *by a treaty duly made* with an Indian tribe has assumed a given duty or obligation to the Indian, the power exists to properly perform this duty.

In the case of *Rainbow v. Young* (161 Fed. Rep., 835, 836) the Circuit Court of Appeals for the Eighth Circuit, in an opinion by Circuit Judge (now Mr. Justice) Van Devanter, says:

* * * While the members of the Winnebago tribe have received allotments in severalty and have become citizens of the United States and of the State of Nebraska, their tribal relation has not been terminated. They are not permitted to alienate, mortgage, or lease the allotments without the sanction of the Secretary of the Interior. Their lease moneys are collected and dis-

bursed by officers of the United States. Their lands and some at least of their other property are not taxable; and the United States maintains a reservation, an agency, and a training School for their benefit. In short, they are regarded as being in some respects still in a state of dependency and tutelage which entitles them to the care and protection of the National Government; and when they shall be let out of that state is for Congress alone to determine.

II.

But the contention is made that the Indians are necessary parties to the suit. If this is so in a substantial sense—if they have rights and interests distinct from those which the United States asserts in their behalf—if, regardless of the United States, they may direct or control the litigation so far as concerns themselves, determine what course shall be pursued, and make stipulations and agreements, then it is useless for the United States to sue, as everything it attempts to do may be nullified by them. The restrictions upon alienation would be idle. As they had been induced to make conveyances, so they might be induced to forego suit for their cancellation, or, bringing such suit, they might be induced to surrender their rights by a compromise decree. The restrictions to be effective must be against alienation in any form or by any method.

In the very nature of the case there must be a right to bring and prosecute a suit for them; and the only party to bring a suit for them is the United States. For the Indians, as Indians, no other guardian is contemplated by any treaty, law, or agreement than the United States. And this suit is brought by the United States as guardian of the Indians as well as in its sovereign capacity to enforce its governmental policy with respect to this people. And in every substantial sense, for every purpose related to the conservation of their rights, they are parties. This case does not present abstract propositions for academic determination, but actual transactions for adjudication. The Indian grantor is named in the bill, his land is described, and the title by which he holds it, the restriction to which the land was subject, the date of the conveyance by him, the person to whom the land was conveyed, and the nature of the conveyance, all are set out. The Indians are parties in every way except as persons bound to sue in their own right and bound to conduct the litigation in their own discretion.

Again it is to be observed that the technical rules of our law of guardian and ward do not apply. Under those rules the infant sues by his guardian or next friend, but is none the less himself the party. Marchie Tiger was permitted to sue in his own name, although his suit was in fact conducted for him by the Government. If the technical rules had been applicable he would have been required to

invoke the intervention of the United States and its appearance upon the record as his guardian. But as that was not necessary, so here the nomination in formal way of the Indian as a party is not necessary. The Indians and the United States are as to the subject matter of this suit identical in interest and right. The interest and right of the Indian are not simply represented by the United States, but they are also and equally the interest and right of the United States. When the United States enforces its policy the Indian is protected, and when the Indian is protected the policy of the United States is conserved. If the Indian alone sues, as in the *Marchie Tiger* case, the supervision and direction of the case by the Government are still necessary for the proper protection of his rights and to enforce the policy of the United States; but when the United States alone sues the rights of the Indian are as fully guarded as if he were nominated as a complainant in the title of the suit.

Under our private law, in the case of an infant, the suit is his, although brought by his guardian or next friend. The rights of the infant, and his rights alone, are asserted and are to be conserved. The guardian or next friend as an individual is not concerned in any way. Here it is otherwise. The United States is concerned on its own account. It asserts rights of its own, shows that they have been violated, and asks that they be vindicated. It may proceed, and should proceed, regardless of the will

of the Indian. Indeed, its proceeding is for the purpose of undoing what the Indian has done and probably would be induced to do again through the medium of this very suit if he were given control of it. The result of the suit is—and that is its purpose—to serve the Indian in his own despite; but such a result can not impair the right of the Government to seek in its own courts a remedy for the wrong done to it by the violation of its legislative enactments, and by the disregard of the policy with regard to the holding of these lands which it has declared not only for the good of the Indian allottee but also for the welfare of the Nation at large. .

The issue in this case is distinctly presented that the defendants have violated the rights of the United States, and to the determination of that issue the United States is the only necessary party complainant. That issue settled in favor of the United States, the decree will of its own force give to the Indians everything to which they are entitled, and so it is not necessary for their protection that they be made parties, and their omission as formal parties can not have been to the prejudice of the defendants.

But should the decision be in favor of the defendants it is said the decree will not stand as a bar against a suit by the Indians. If this be so, which we do not concede, it would simply present the case of two parties claiming a like right against a third party and suing separately for its enforcement. The decision in one case, in effect, though not in

form, settles the second, and the defendant may invoke the doctrine of *stare decisis*, while he may not plead *res judicata*. This affects only a matter of convenience, and the balance of convenience here is greatly on the side of the suit as brought by the Government. As to this the Court of Appeals in the *Allen* case (179 Fed. Rep., l. c. 22) said:

* * * It is not the mere convenience of the parties before the court which renders absent parties indispensable, but the protection of the rights of those absent parties. Looking at the entire litigation, justice to the defendants will also be promoted by this practice. The Indians have already parted with their lands by deed. While they have a legal right to assail the conveyances, if they were made in violation of the statute against alienation, the exercise of that right by the Indians after a decision against the Government in the present suit is so problematical that it would be oppressive to compel the plaintiff to bring all allottees before the court and would also add unnecessarily to the costs of the defendants in case the suits should go against them. Again, the allottees, if present, would have no control over the suits. Their consent to a judgment in favor of the defendants would not defeat the right of the Government. In our judgment, therefore, there is no defect of parties.

In the *Bell Telephone* case (128 U. S., 315) it was urged that because a person sued as infringer could set up as a defense the invalidity of the pat-

ent as procured by fraud the United States could not sue in its own behalf to cancel the patent. The limited form of relief given to private individuals, however, was held not to conflict with the more comprehensive relief to which the United States was entitled. The court cites with approval the case of *The King v. Oliver* (3 Levinz, 220), which was a suit by the King to set aside a patent for a market to be held in Chatham, which was claimed by the citizens of Rochester to be in fraud of their rights; and in this case the court said that "it is not unusual for the King to have his remedy, as well as the subject also; as in batteries, trespasses, etc., the King has a remedy by information and indictment, and the party grieved by his action."

In *United States v. San Jacinto Tin Co.* (125 U. S., 273), which was a suit to annul a patent to land, it was said, "If there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances" (p. 286). But it is plainly held that if such an obligation or interest does exist, an action by the United States may be maintained.

Here is the obligation of the Government to the Indians and the interest of the Government for the welfare of all its people that the obligation be recognized.

The various cases cited by us to show the right of the Government to sue in this case in any form all

show as clearly its right to sue in its own name regardless of the will or desire of the Indians and without joining them as parties.

Mere matters of form in the institution and prosecution of suits are the subject of legal regulation, and warrant for the form in which this suit is brought may be found in recent enactments of Congress.

The act of May 27, 1908 (35 Stat., 312), commonly known as the "Removal of Restrictions Act," was comprehensive statement of Congress with reference to the entire situation as to the status of lands and allottees among the Five Civilized Tribes.

Since the last special enactment on the subject of the Five Civilized Tribes, statehood had intervened, covering the territory occupied for so long by these Indians, with a distinct reservation of power in the United States to control and legislate for them and their property as fully and completely as though no act of statehood had been passed, no constitution adopted, or State formed.

Under its broad general powers, and under this reservation as well, Congress passed this legislation clearly defining what lands should be alienable and what should not.

It should be borne in mind, too, that the rolls of membership in the tribes had now closed and that the work of allotment, while not entirely completed, was approaching completion, and that there would then remain only the disposition of the tribal prop-

erty reserved from allotment and the distribution of the funds of the tribes per capita in accordance with prior laws, also that no provision had been made and apparently none intended looking to the cessation of such governmental activity over the Indian such as was carried on by the Indian agency.

The continuance of this was recognized as necessary and the basis of the right to alienate was classified so far as such classification was deemed wise. Provision was made for the right to alienate on the part of those remaining in the restricted classifications by the special removal of restrictions against alienation by the Secretary of the Interior upon his determination that such procedure was for the best interest of the applicant.

Section 6 of the act, after providing for certain investigations of guardians and curators and action thereon in the event of discovery of fraud, establishes a system of district agents or representatives of the Secretary of the Interior to advise the allottee as to his rights and to sue in his name, when requested, free from charge except court fees for the cancellation of any illegal instrument taken. The sum of \$90,000 is appropriated by paragraph 3 of section 6 for this purpose, the same to be expended under the direction of the Secretary of the Interior. Paragraph 4 of said section is as follows:

And there is hereby further appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately avail-

able and available until expended as the *Attorney General* may direct, the sum of \$50,000, to be used in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the Eastern Judicial District of Oklahoma; *Provided*, That the sum of \$10,000 of the above amount, or so much thereof as may be necessary, may be expended in the prosecution of cases in the Western Judicial District of Oklahoma.

Paragraph 5 is with reference to suits brought concerning town lots by authority of the Secretary of the Interior, these suits having been started prior to the passage of the act.

Paragraph 6 is as follows:

Nothing in this Act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove clouds therefrom, or clear title to the same, in cases where deeds, leases, or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without cost or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this Act.

The suits in the mind of Congress, to be paid for by the \$50,000 appropriated, can not have reference to those to be brought by the district agents, for such are to be brought by them as representing the Interior Department, and the expenditure therefor is under the direction of the Secretary of the Interior. The suits Congress had in mind must have been something different, for the expenditure therefor is to be made under the direction of the Attorney General, and they are to be recommended by the Secretary of the Interior. Further, a portion of the appropriation is to go particularly to the prosecution of cases in the western district of Oklahoma, where there are no lands of the Five Civilized Tribes and where district agents were not provided for by the act. The Indian agency in charge of the affairs of the Five Civilized Tribes is confined in its jurisdiction to the eastern district of Oklahoma which comprises the territory of said tribes. The \$10,000 expenditure in the western district of Oklahoma was, as a matter of fact, to cover, and did cover, certain suits regarding lands of the Kickapoo Tribe of Indians located in said western district. What suits, then, did Congress have in mind when it provided for this expenditure? It could not have been the town-lot suits, so called, for those were paid for by the Creek national tribal fund, and are confined to that tribe alone. Such suits as the Secretary might recommend to the Attorney General to be brought is clearly what Congress provided for, and the suits

at bar, together with the others in the same litigation, are, as alleged in the bills, such suits brought by the Attorney General on the recommendation of the Secretary of the Interior. Paragraph 6 of section 6 plainly shows the care Congress took to declare its intention that such suits were necessary. It must be presumed to have had full knowledge of the existence of the situation in eastern Oklahoma calling for relief, and in said paragraph states its duty and intention to give relief by the bringing of suits to recover for the Indians the lands wrongfully taken from them, realizing that unless this was done the removal of restriction provisions would have nothing on which to act and that the restrictions would have been virtually removed, so far as a practical result is concerned, by the open and notorious violations of the laws against alienation. In order to completely fulfill its duty of protection it was bound to see that the illegal transfers were wiped out in order that full benefit might be given to the Indian of the protection of the restrictive acts, otherwise the guardianship would have amounted to nothing, because of the failure to enforce the provisions of the restraint at the time of their violation. At the time of the passing of this section the restrictions were not removed, as the portion of the act removing restrictions did not go into effect until 60 days after its approval, namely, July 27, 1908. It should be noted also that the cases before the court and, as well, a considerable part of the litigation involving that

portion of the lands the restrictions as to which were removed on July 27, 1908, were filed before that date, although most of the suits involving the still restricted lands were filed subsequent thereto. The entire litigation of which the cases at bar are a part carries out the intention of Congress, disclosed in paragraph 6 of section 6, in that it involves only such lands as were restricted upon the date of the passage of said section, namely, May 27, 1908.

The interpretation of this section by the departments of the Government intrusted with its execution may be urged as an authority to sustain the authorization. It is well settled that the interpretation placed on a provision by the department of the Government intrusted with its execution, while not conclusive, is of great weight in determining its meaning.

Mr. Justice McKenna, speaking for the court in *United States v. Hammers* (221 U. S., 220, l. c. 225), said:

* * * the rule often authoritatively announced is that "where a court is doubtful about the meaning of an act of Congress, the construction placed upon the act by the department charged with its enforcement is in the highest degree persuasive if not controlling."

And at page 228:

* * * Conceding then that the statute is ambiguous, we must turn as a help to its

meaning, indeed in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. At any rate their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.

It is not necessary that the authority for the suits as brought shall be in any direct language by Congress. If its intent to so authorize can be shown, it is sufficient. To determine the intent of Congress in any matter before the courts for construction acts *in pari materia* can be and ought to be examined.

When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. [*Marchie Tiger v. Western Investment Co.*, *supra*, l. c., 309.]

In 1909, in the sundry civil appropriation bill, Congress, after considerable objection and after full debate and a full explanation of these bills as brought and with a complete understanding that the money appropriated by the act of May 27, 1908, was being used for the purpose of paying the expenses incident to these suits, in the full light of the entire situation appropriated another \$50,000

for their continuance, the following language being used:

Suits to set aside conveyances of allotted lands: For the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the Eastern judicial district of Oklahoma, to be expended under the direction of the Attorney General, to be immediately available, fifty thousand dollars: *Provided*, That the sum of ten thousand dollars of the above amount, or so much thereof as may be necessary, may be expended in the prosecution of cases in the Western judicial district of Oklahoma. [Act of March 4, 1909, 35 Stat., 1014.]

In 1910 again Congress appropriated \$50,000 for the further continuance of the litigation. (Act June 25, 1910, 36 Stat., 703, 748.) This also was opposed in both Houses and full explanations made. This appropriation provision is as follows:

Suits to set aside conveyances of allotted lands, Five Civilized Tribes: For the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the Eastern judicial district of Oklahoma, to be expended under the direction of the Attorney General, fifty thousand dollars: *Provided*, That the sum of ten thousand dollars of the above amount, or so much thereof as may be necessary, may be expended in the prosecution of cases in the Western judicial district of Oklahoma, and

not to exceed ten thousand dollars of said sum shall be available for the expenses of the United States on appeals to the Supreme Court of the United States.

Once more, in 1911, after more opposition and urging on the part of those interested in the defeat of the litigation and the good to the Indian it had already accomplished in restoring thousands of acres of land to him through the cases which had been settled, another \$50,000 was appropriated that the duty of the Government might be fulfilled. The following is the section of the 1911 appropriation act of March 4, 1911 (36 Stat., 1363, 1425):

Suits to set aside conveyances of allotted lands, Five Civilized Tribes: For the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the Eastern judicial district of Oklahoma, to be expended under the direction of the Attorney General, fifty thousand dollars: *Provided*, That the sum of ten thousand dollars of the above amount, or so much thereof as may be necessary, may be expended in the prosecution of cases in the Western judicial district of Oklahoma, and not to exceed ten thousand dollars of said sum shall be available for the expenses of the United States on appeals to the Supreme Court of the United States.

In the light of the original act authorizing the suits and the subsequent acts recognizing the suits brought as carrying out the purpose of Congress

by successively appropriating money for their prosecution, it was not necessary for Congress further to provide explicitly that the allottees need not be nominated as parties complainant in the suits.

We need not discuss this question further. The suits may be maintained by the United States to enforce its own policy as a Nation in discharge of its undoubted duty to its Indian wards and by positive sanction of acts of Congress.

A tender of the consideration paid by the grantors is not a necessary condition of maintaining these suits. The United States got nothing and so should restore nothing. Moreover, as the transactions assailed were in violation of public law and national policy they are absolutely void and should be so dealt with. The case is clearly within the rule of *United States v. Trinidad Coal Co.* (137 U. S., 160, l. c. 170), wherein the court said (p. 170):

It is contended by the defendant that the United States is subject, as a suitor, to the same rules that control courts of equity when determining, as between private persons, whether particular relief should be granted; that the government, asking equity, must do equity; and, consequently, that the bill is defective in not containing a distinct offer to refund the moneys which, it is alleged, were furnished by the defendant to the several persons to whom patents were issued. The rule referred to should not be enforced in a

case like the present one. In the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. It is not to be presumed that the small price per acre required from those desiring to obtain a title to such lands had any influence in determining the policy to be adopted in opening them to entry. They were held in trust for all the people; and in making regulations for disposing of them, Congress took no thought of their pecuniary value, but, in the discharge of a high public duty and in the interest of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value. The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions. It is not disputed that the Attorney General may, in virtue of the authority vested in him, institute this suit. According to the allegations of the bill, which are admitted to be true, the defendant is a wrongdoer against whom the government seeks to vindicate its policy in reference to the development of its vacant coal lands. Congress, when establishing that policy, was not bound to assume that individuals or associations of individuals would attempt to defeat it by means of fraudulent schemes or otherwise. If the defendant is entitled, upon a cancella-

tion of the patents fraudulently and illegally obtained from the United States, in the name of others, for its benefit, to a return of the moneys furnished to its agents in order to procure such patents, we must assume that Congress will make an appropriation for that purpose, when it becomes necessary to do so. The proposition that the defendant, having violated a public statute in obtaining public lands that were dedicated to other purposes, cannot be required to surrender them until it has been reimbursed the amount expended by it in procuring the legal title, is not within the reason of the ordinary rule that one who seeks equity must do equity; and, if sustained, would interfere with the prompt and efficient administration of the public domain. Let the wrongdoer first restore what it confesses to have obtained from the government by means of a fraudulent scheme formed by its officers, stockholders and employes in violation of law.

Directly in point is *Pilgrim v. Beck* (69 Fed. Rep., 895, l. c. 898), where the court said:

* * * When the leases of the allotted lands were taken, the Flourney Company, and all others following its example, knew that, under the express provisions of the acts of congress providing for the allotments in severalty, an absolute restriction against alienation by the allottees was enacted, and all power to contract about the same was denied, until the lapse of the 25 years of occu-

pancy provided for in the statutes. These parties knew, therefore, that the leases obtained from the Indians were wholly void, and absolutely worthless. When the present bill was filed the decision of the court of appeals in the case brought by William H. Beck et al. against the Flournoy Live-Stock & Real Estate Company had been rendered, in which it was held that these leases were void; the opinion in that case having been filed December 10, 1894. Under these circumstances, it must be held that when this bill was filed the complainants knew that the leases under which they held had been taken, not only without authority of law, but in absolute defiance of the express provisions of the acts of congress; that the invalidity thereof had been judicially adjudged by a court of competent jurisdiction; that the continued occupancy of the lands by the tenants was without warrant of law, and was in direct conflict with the control over these lands vested in the interior department of the government. This being true, it follows that no equity is created in complainants by the fact that they have cultivated these lands during the season of 1895 which justifies the court in sustaining the present bill for their benefit. It may be true that many of the subtenants have been in fact misled by the representations made by the Flournoy Company, or its officers, in regard to their rights, and that they have relied thereon, but such representations are not chargeable against the United States. The bill not only wholly

fails to show any legal right to the occupancy of these lands on part of the complainants, but in fact affirmatively shows that this occupancy, and the leases upon which it is based, are held in violation of the laws of the United States, and in open defiance of the authority of the United States over a subject-matter within the paramount control of the national government; and there is no ground upon which the court can give any consideration to the fact that the complainants have planted and cultivated the crops now growing on these lands. The management and control of these lands for the benefit of the Indians is in the hands of the department of the interior, and it is for the officials of that department to give weight to any equities or considerations of hardship that may exist in favor of any of the complainants herein.

That the decree in favor of the Government results in benefit to the Indian does not require on his behalf a tender of the consideration he received, as this would defeat the very purpose of imposing the restriction. The improvidence implied by the restriction implies also that the tender could not be made, and to charge it as a lien upon the land would result in the alienation of the land. The requirement of the law was plainly that these defendants should observe the restrictions absolutely, and they must take the chance of loss of whatever they ventured in disregard of them.

III.

The objection of multifariousness is a matter entirely within the discretion of the court. The trial court in its opinion intimates that if the United States is properly sole complainant the bills might not be multifarious. The Court of Appeals found the objection of multifariousness to be "without merit."

Story on Equity Pleading, 4th ed., sec. 539, says:

There is not any positive, inflexible rule,
as to what * * * constitutes multifari-
ousness * * *.

These courts have always exercised a sound discretion in determining, whether the subject-matters of the suit are properly joined, or not; and whether the parties, plaintiff or defendants, are also properly joined, or not.

In Jennison's Chancery Practice, at page 26, the rule is thus stated:

As to what constitutes multifariousness no general rule can be laid down. Every case must be governed by its own circumstances, and the court must exercise a sound discretion; still it may be said generally that there must be a common interest, a common ground of relief, and a common ground of invalidity.

Many cases might be cited and excerpts taken from many learned writers, but it could serve no useful purpose. Each case presents its own set of

facts, and upon those facts the courts have determined whether the objection of multifariousness may properly be sustained.

As set forth in the early part of this brief, these defendants, while having no common interest in each other or in the property, the subject matter of the suits, have yet a common interest in so far as their relation to the complaint is concerned in that they are in a given bill all charged with a violation of the same law against alienation, and the bill must stand or fall as to each and all of the defendants on the interpretation of that law. If the contention of the Government that a certain class of lands is inalienable at the time certain instruments were taken is found to be incorrect, all bills involving that class of lands, and such bills involve no other class, are by that finding disposed of. So also if the contention as to inalienability is sustained, the prayers of the bill must be granted, the instruments canceled, and possession as to all such lands sued upon given. All the facts necessary to sustain the bills or to defeat them, for that matter, are matters of public record, and the verification of the data contained in paragraph 6 from such record would establish the right to the relief asked for without further showing, assuming the lands are determined to be inalienable.

The *Flournoy* cases, *supra*, are strikingly analogous to the cases at bar in this regard. In

69 Federal Reporter, at page 890, Judge Shiras said:

The second ground of demurrer is that the bill is multifarious, because it is exhibited against a large number of defendants who hold under different leases, executed by different lessors, and that there is no common interest justifying the bringing of one suit, instead of separate proceedings against each defendant.

In *Walker v. Powers*, 104 U. S. 245, it is said:—

“By multifariousness ‘is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters, of a distinct and independent nature, against several defendants, in the same bill.’ Story Equity Pleading Section 271.”

In the case at bar the complainant's right of action is based *upon the trust relation* existing between the United States and Indians in regard to the lands in question, and there is therefore a common interest and a common question, as against all the defendants; and therefore the bill will not be held to be multifarious, being within the rule stated in Story, Eq. Pl., Section 285, to wit:—

“Another exception to the general doctrine respecting multifariousness and mis-

joinder, which has already been alluded to, is when the parties (either plaintiffs or defendants) have one common interest touching the matter of the bill, although they claim under distinct titles, and have independent interests" (in which event the objection of multifariousness will not be sustained).

Hale v. Allinson (188 U. S., 56, 77) is a case which, upon the facts, was decided to be multifarious, but the following quotation outlines the principle, and it is submitted, applying it to the cases at bar, that the objection of multifariousness should be found by this court also to be "without merit."

* * * Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situation of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interest of any.

In the case of *Illinois Central Railroad Co. v. Caffrey et al.* (128 Fed. Rep., 770, 775), Thayer, circuit judge, said:

* * * It is too plain for serious controversy that the convenience of all parties, including the defendants and the court in which the cases are pending, will be subserved by allowing the actions to proceed against the defendants collectively. Nor is it perceived that the substantial rights of any of the defendants will be jeopardized by so doing. It is not suggested that they have separate defenses to make, and, even if a separate defense does exist in favor of any defendant, it can be urged with the same facility and effect in the present suits as if such defendant was sued separately, and probably at less cost. Indeed, the court feels persuaded that the plea of multifariousness is urged mainly to delay a final hearing, rather than to enable the defendants to make a defense on the merits, which they can better make if they are sued separately * * *; but where the cause of action is one in which they have an immediate interest, because a like cause of action exists against themselves, to which they may make the same defense as others will make, and by joining them with others the convenience of everybody, including the court, is subserved, and the rights of everyone may be safeguarded and valuable time saved, no reason is perceived why they may not be joined, there

being no hard and fast rule of law which forbids. * * * The defendants have a common interest in the questions to be litigated, and it is desirable that they should be heard and determined in a single trial.

In *Bitterman v. L. & N. R. R. Co.* (207 U. S., 205, l. c. 226) there was no direct community of interest between the several defendants, but the court said:

* * * The acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions.

In conclusion.

The suit in equity by the Government is the sole practical means of carrying out its policy with regard to the full-blood Indians of the Five Civilized Tribes. The individual Indians can not and will not assert their rights. Even if they attempted to do so the delay and the expense incident to the prosecution of 30,000 separate suits would defeat their utmost endeavors. Every right of the Government, of the Indians, and of the defendants can be conserved in the pending suits, and it can be done expeditiously, economically, and effectively.

We respectfully submit that the action of the Circuit Court of Appeals was right and should be sustained.

F. W. LEHMANN,
Solicitor General.

A. N. FROST,
HARLOW A. LEEKLEY,
Special Assistants to the Attorney General.
OCTOBER, 1911.

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

J. S. MULLEN AND W. B. JANSEN, appellants, v. THE UNITED STATES.	} No. 404.
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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

**BRIEF AND ARGUMENT OF THE UNITED STATES ON THE
SPECIAL QUESTION OF ALIENABILITY OF LANDS IN-
VOLVED IN THIS SUIT.**

STATEMENT.

This brief is supplemental to the brief filed by the Government on the three general questions passed upon by the Circuit Court and the Circuit Court of Appeals: (1) Capacity in the United States to sue; (2) defect of parties; and (3) multifariousness, and is directed solely to a discussion of the special question of the alienability of the

lands involved in the bill at the date of the execution of the conveyances complained of therein.

This appeal involves lands allotted to Choctaw Indians. The United States as complainant has heretofore filed 87 bills seeking to have cancelled attempted conveyances to the number of 9,247, all involving lands of Choctaw Indians. In each bill is grouped all conveyances covering lands belonging to a certain class. There are 12 of these classes designated for the Choctaw bills. This appeal before the court has to do with the third class—conveyances executed prior to April 26, 1906, by Choctaw Indians of the full-blood, of lands inherited by them; and there are 125 conveyances of this class and 100 defendants involved in this appeal.

There are pending in the Circuit Court 8 other bills of the same class, in which are included 1,088 other instruments alleged by the Government to be invalid and in which are involved 898 grantees named as defendants. In each of the instruments complained of the grantor is a Choctaw Indian of the full blood. The land included was allotted to a Choctaw Indian of the full-blood, deceased, and the grantor attempted to convey to the defendant his inherited interest in the land involved.

The identical questions raised in this appeal under the same treaties and acts of Congress also apply to a class of suits brought by the Government to have declared invalid like conveyances of lands allotted to Chickasaw Indians which have been included in 7 bills, filed at intervals, involving 83

instruments and 57 defendants. A determination of the law by this court in this appeal will settle the question of the alienability of the lands involved in each conveyance complained of in all the bills of this class.

The third paragraph of the bill alleges (R., 5) that Congress by an act approved July 1, 1902 (32 Stat., 641), provided that lands allotted to members of the Choctaw Tribe of Indians as homestead should be inalienable and that lands allotted other than homesteads should not be alienable until the expiration of five years after the issuance of the patent to the allottee, and that the said act of Congress was duly accepted and ratified by the Choctaw people on September 25, 1902.

The fourth paragraph of the bill alleges (R., 6) that each of the tracts of land involved in the bill had been allotted to a Choctaw Indian and had been inherited by Choctaw Indians of the full-blood who appear in each transaction complained of as grantors, and that the said lands were inalienable at the date of the execution of the instruments sought to be canceled.

The Circuit Court, having sustained the demurrers to the bills on other grounds, did not pass upon the special question of alienability, and this was assigned as error in the appeal to the Circuit Court of Appeals. (Sixteenth assignment of error, R., 45.)

On the appeal to this court the appellants assign as error (ninth) that the court erred in reversing

the judgment of the trial court without having first determined that the lands sued for were subject to restrictions upon alienation, (twelfth) that the court erred in holding that Congress could enlarge or extend restrictions upon alienation, and (fourteenth) that the Court of Appeals erred in reversing the judgment of the trial court because the only ground upon which the validity of the conveyances is assailed is that they are in violation of statute prohibiting conveyance by full-blood heirs of inherited lands of members of the Choctaw and Chickasaw tribes when there was no such legislation in existence. (R., 68.)

In this brief will be set out:

I. The portions of treaties and acts of Congress necessary to the full discussion of the question of the alienability of the lands involved.

II. The argument for the Government, in which it is contended that the conveyances complained of, at the date of their execution, not only were taken by the appellants in violation of the provisions of the treaties and acts of Congress imposing restrictions upon the lands included therein, but also that the class of lands involved has always been and is now restricted as to its alienation.

I.

TREATIES AND ACTS OF CONGRESS APPLICABLE.

The original agreement between the Government and the Chickasaw and Choctaw Tribes providing for the allotment of tribal lands to the individual

members of the tribe and called the Atoka agreement was incorporated in section 29 of the act of June 28, 1898 (30 Stat., 495), known as the Curtis Act, "An act for the protection of the people of the Indian Territory, and for other purposes."

Portions of section 11 of that act read as follows (p. 497):

Sec. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the Commission heretofore appointed under acts of Congress, and known as the "Dawes Commission," shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same * * * *Provided further,* That the lands allotted shall be nontransferable until after full title is acquired and shall be liable for no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held * * *

It is provided in the Atoka agreement (p. 507):

All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent, and each allottee shall select from his allotment a homestead on one hun-

dred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent. This provision shall also apply to the Choctaw and Chickasaw freedman to the extent of his allotment. Selections for homesteads for minors to be made as provided herein in case of allotment, and the remainder of the lands allotted to said members shall be alienable for a price to be actually paid, and to include no former indebtedness or obligation—one-fourth of said remainder in one year, one-fourth in three years, and the balance of said alienable lands in five years from the date of the patent.

That all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sale hereinbefore provided, shall be null and void. * * *

The act approved July 1, 1902 (32 Stat., 641), known as the Choctaw and Chickasaw agreement, was ratified by the tribes September 25, 1902, and certain sections read as follows:

12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.

15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.

16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided*, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mans-

field's Digest of the Statutes of Arkansas; *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.

The act of April 26, 1906 (34 Stat., 137-148), extends to a period of 25 years the time within which Indians of the full-blood of each of the Five Civilized Tribes are forbidden to alienate, sell, dispose of, or encumber any of their lands, and all conveyances of inherited lands by heirs of the full blood are made subject to the approval of the Secretary of the Interior.

Sec. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided*, how-

ever, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions be, and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee. (34 Stat. 144.)

* * * * *

Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized

Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper Court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such Court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe (p. 145).

Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner (p. 145).

The last act upon the subject of the alienation of Indian lands, the act making the appropriation

under which the large number of suits of which the one now before the court is one, is the act of May 27, 1908 (35 Stat., 312), and enacts these provisions:

That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed blood Indians having half or more than half and less than three quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he

may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an Act entitled "An Act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma (p. 312.)

* * * * *

Sec. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees, arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law (p. 313).

Sec. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void (p. 313).

* * * * *

Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the Court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in Section one hereof, for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his

homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of Section twenty-three of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section." (35 Stat. 315.)

II.

ARGUMENT.

THE LANDS INCLUDED IN THE ATTEMPTED CONVEYANCES INVOLVED IN THIS APPEAL WERE RESTRICTED AS TO THEIR ALIENATION (A) (1) BY THE TERMS OF THE ATOKA AGREEMENT AND (2) BY THE ACT OF JULY 1, 1902, KNOWN AS THE SUPPLEMENTAL CHOCTAW - CHICKASAW AGREEMENT; AND THE RESTRICTIONS WERE RETAINED (B) BY THE ACT OF APRIL 26, 1906, AND BY THE ACT OF MAY 27, 1908.

A. The Atoka agreement and the supplemental agreement placed restrictions upon the alienation of the lands involved.

It is the contention of the appellants in this case that the instruments involved are valid, the lands included being unrestricted as to their alienation at the date of the execution of the conveyances complained of, in each instance prior to April 26, 1906. The grantors are heirs of the full-blood of the deceased full-blood Choctaw allottee of the lands involved, including lands allotted as a homestead and lands allotted exclusive of homestead.

It is strongly insisted by the Government that the language of the Atoka agreement, in force at the time of the execution of the instruments sought to be canceled, except wherein modified by the terms of the act of July 1, 1902, and the language of the later act, forbid the alienation of any of the lands involved.

In the Atoka agreement it is provided that the homestead selected by the allottee shall be inalienable for 21 years from the date of patent and that the remainder of the land allotted to the members of the tribe shall be alienable for a price to be actually paid and to include no former indebtedness or obligation—one-fourth in one year, one-fourth in three years, and the balance of said alienable land in five years from date of patent; and all contracts looking to the sale or encumbrance of said lands, *except the sale as hereinbefore provided, shall be void.*

The act of July 1, 1902, modified these provisions by declaring that the homestead selected by the allottee should be inalienable during the lifetime of the allottee, not exceeding 21 years from the date of the certificate of allotment, and that all lands allotted to members of the tribe except such land as is set aside to each for a homestead should be alienable after issuance of patent—one-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years, in each case from the date of patent—and that none of the lands allotted to members of the tribe should be affected

or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land could be alienated under the act and that none of said lands should be sold *except as herein provided*.

It is insisted by the Government that in neither of these two acts of Congress was there any provision made for the alienation of the land allotted as homestead therein declared to be inalienable and that there could be alienated by the allottee only the land allotted exclusive of homestead, and that only one-fourth in one year, one-fourth in three years, and one-fourth in five years from the date of patent, with the further provision, in the supplemental agreement, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value. The land allotted as homestead could not be alienated either by the allottee or his heirs, under the provisions of the acts of June 28, 1898, and July 1, 1902, and the land allotted exclusive of homestead could be alienated only a certain amount at each one of three specified times. While the restrictions as to land allotted as homestead allotment is directed toward it while in the hands of the allottee himself, it is maintained that, having once attached, the wording compels the conclusion that future specific legislation is necessary to remove it, even after the death of the allottee. (*Goodrum v. Buffalo*, 162 Fed. Rep., 817.) In so

far as the lands of citizens of the full-blood are concerned, this has not yet been done, but restrictions have been retained through successive acts of Congress.

Manifestly, Congress intended the homestead of a citizen to be longer restricted than other lands. It does not follow that because the homestead allotment is made inalienable during the lifetime of the allottee, not exceeding 21 years from the date of allotment certificate, that it becomes *alienable* upon the *death* of the allottee, or, if he lives, after 21 years from the date of allotment certificate. In these cases there has been quibbling by the appellants of words and phrases rather than a broad consideration of the policy of the Government in its relation to these Indians, from which could have been gathered its plain intention and a correct construction by them of the acts of Congress. It will be noted (sec. 15) in the act of July 1, 1902, that lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act nor shall said lands be sold "*except as herein provided,*" and the "lands allotted" included both the homestead and land allotted other than homestead. The *only* sale provided for in that act was the sale after issuance of patent of lands allotted *other than homestead*, one-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years, in each case

from the date of patent, and then for not less than the appraised value of said land. There is no provision made for the sale of the homestead allotment.

The appellants have claimed that there is no restriction upon the alienation of inherited surplus allotments, and that the heirs could alienate this land because no restrictions existed. It has been held that the restrictions run with the land (*Goodrum v. Buffalo*, 162 Fed. Rep., 817), and the incidental reference to heirs at the close of section 16 of the act of July 1, 1902, shows that Congress understood that the one, three, and five year periods applied to the heirs as well as to the allottees themselves. And, too, the time after which the surplus lands could be alienated was not to begin to run until *after the issuance of patent*, and in none of the transactions complained of in this record had the patent to the land involved been issued. But there is a provision in the act of April 26, 1906 (sec. 19), that conveyances theretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and *subsequent to the removal of restrictions*, where patents thereafter issue, shall not be deemed or held invalid *solely* because said conveyances were made prior to issuance and recording or delivery of patent or deed; but "this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract

or agreement was entered into before the removal of restrictions be, and the same is hereby, declared to be void." This provision is emphatically confined to sales "invalid solely" because the sale was prior to patent.

It is clear from the wording alone of the original agreement incorporated in the act of June 28, 1898, that the homestead allotment could not be alienated until the expiration of *at least* 21 years from date of patent, and that none of the surplus allotment could be alienated until the expiration of at least 1 year from date of patent. While the act of July 1, 1902, provided that inalienability of the homestead should not continue beyond 21 years from the date of certificate of allotment, it did not make any provision for the alienation, but evidently left the matter for the further and later consideration of Congress. A provision in the Atoka agreement, included in the act of June 28, 1898, expressly declares that all contracts of sale or incumbrance, "except the sale hereinbefore provided," that is, the sale of lands allotted other than homestead in 1, 3, and 5 years from date of patent, to be null and void. The wording of this provision shows the construction to be given to the provision of the act of July 1, 1902, and indicates the intention of Congress to permit, by the later act, no alienation of any of the lands of the Choctaw and Chickasaw allottees except the lands allotted exclusive of homestead, and those only after issuance of patent—one-fourth in 1 year, one-fourth in 3 years, and the

balance in 5 years. The sweeping prohibition in section 15 of the act of July 1, 1902, is modified only by the sale provided for in section 16 of a certain class of lands and in a certain manner prescribed.

This court, in *Smith v. Stevens*, 10 Wall., 321, 326, by Mr. Justice Davis, states:

It needs no argument or authority to show that the statute, having provided the way in which these half-breed lands could be sold, by necessary implication, prohibited their sale in any other way.

It is contended that Congress has always considered, as indicated by its policy, that the lands of these Indians were under a general restriction against alienation whether allotted or unallotted and that, until Congress expressly authorized their alienation, none could be made by the allottees or their heirs. In the case of *Hancock et al. v. Mutual Trust Co. et al.* (103 Pacific, 566), it is assumed by the Supreme Court of Oklahoma that the *negative* provision of the acts of June 28, 1898, and July 1, 1902, forbidding alienation during the lifetime of the allottee, results in a *positive* provision that the heirs may alienate at his death. In the light of the ascertained policy of Congress this is seen to be not true. It is not reasonable to so construe the provisions of these acts to permit the alienation of homestead allotment by the heirs and not the surplus. The Supreme Court of the State of Oklahoma is now being asked, in another case, *Silis*

Hoteyabi et al. v. T. H. Vaughn et al., by the United States Attorney for the Eastern District of Oklahoma, to reconsider its decision in the *Hancock* case, in which the Government of the United States was not represented, justifying the request on the ground that since the decision in the *Hancock* case the courts of the United States have passed upon several pertinent matters of construction of provisions in the acts of Congress relating to the Five Civilized Tribes.

Very recently, in an opinion not yet reported, in the case of *United States v. Dowden et al.*, the Circuit Court of the United States for the Eastern District of Oklahoma held that conveyances by his heirs prior to April 26, 1906, of lands allotted to a deceased Chickasaw Indian were invalid, in the following language:

It follows that if the restrictions attaching to allotments made direct to living members follow the lands into the hands of the heirs of such allottees in case of their death before the term of the restriction expires, which they undoubtedly do (*Goodrum v. Buffalo*, supra), the same is true of lands coming to heirs by virtue of allotments made in the name of deceased allottees as provided in section 22. The land was subject to the one, three, and five year restrictions in the hands of his heirs, at the time of their attempted conveyance of the same, and such deeds are void.

I have carefully read and considered the very exhaustive and learned opinion of the State Supreme Court in *Hancock v. Mutual Trust Company*, 103 Pac. 566, wherein a conclusion contrary to that arrived at by me is announced, and I have not reached my conclusions here expressed without the most careful research and thought which I have been able to give the matter. But for the reasons above stated, and especially in view of the holding in the *Shulthis* case, *supra*, I am forced to the conclusion that the restrictions provided in sections 15 and 16 attach to lands allotted under the provisions of section 22.

The appellants have at various times, in support of their position, quoted a letter dated February 9, 1906, from the Assistant Attorney General for the Interior Department to the Secretary of the Interior, giving it as his opinion that the restrictions upon the alienation of lands allotted as homesteads in the Choctaw and Chickasaw Nations terminated with the life of the allottee. After quoting sections 12, 15, and 16 of the act of July 1, 1902, he states that, while there is *no* provision *affirmatively* authorizing the sale of homestead allotments, the provision that they shall be inalienable for a certain definite period carried with it the *inference* that they may be sold after the expiration of that period, but *admits* that there appears to be no good reason for allowing homesteads to be sold by the heirs of the deceased allottee when the sale of the other por-

tions of the allotment are prohibited. The matter he dismisses with the statement that this would have been a popular and strong argument before the legislative body, but is not entitled to consideration, as the language is so clear as to leave no room for construction.

This letter antedated the act of April 26, 1906, extending restrictions upon the class of lands covered by the opinion, and whatever force it has is lost from the fact that the Secretary of the Interior himself has requested (R., 2) this suit as well as many others involving this class of lands and others, under the authority of the act of May 27, 1908 (35 Stat., 312), in which there is appropriated (sec. 6) a large sum of money to be expended as the Attorney General may direct in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior "to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or to clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to the law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; * * *."

Evidently the Secretary of the Interior and the Attorney General did not, in 1908, and do not now agree with the opinion of the assistant law officer of 1906.

In the brief filed by the appellants in this case in the trial court the appellants make their position

perfectly plain in referring to section 12 of the act of July 1, 1902, in the following:

It would seem that this section is so clear that its meaning may be comprehended by anyone. Upon either the death of the allottee or the expiration of the twenty-one years from date of certificate of allotment the land becomes alienable. Therefore, prior to the 26th day of April, 1906, there can hardly be a question as to the right of the heirs of a deceased allottee to convey the inherited homestead. The restrictions against the alienation of the homestead are purely personal in their nature and cease upon the death of the allottee.

None of the statements in the paragraph quoted, except the one contained in the first sentence, are admitted by the appellee. On the contrary, it is maintained by the Government that the land allotted as homestead was *not* alienable by the heirs of the deceased allottee prior to April 26, 1906, and that the land allotted other than homestead was not alienable by the heirs of a deceased allottee except in the manner provided by section 16 of the act of July 1, 1902.

In this case, especially, the appeal before the court, involving conveyances by full-blood heirs of lands allotted to a full-blood citizen of the Choctaw Tribe of Indians, a proper consideration of this act and of subsequent legislation *in pari materia* demonstrates the purpose of Congress to impose and retain restrictions upon the alienation of this

class of lands. The construction placed by the appellants upon the provisions of the act of July 1, 1902, is inconsistent with subsequent legislation of Congress upon the same subject, which proceeds upon the theory that in the understanding of Congress, at least, restrictions still exist so far as inherited lands of full-blood Indians are concerned.

When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. (*Marchie Tiger v. The Western Investment Company et al.*, 221 U. S., 286, 309, citing *Cope v. Cope*, 137 U. S., 682; *U. S. v. Freeman*, 3 How., 556.)

In cases admitting of doubt the intention of the law maker is to be sought in the entire context of the section—statutes or series of statutes *in pari materia*. (*Atkins v. Fibre Disintegrating Co.*, 18 Wall., 272, 301.)

B. The acts of April 26, 1906, and May 27, 1908, retained restrictions.

The lands involved in the *Choctaw* case before the court were taken out of the operation of the restriction provision of the act of July 1, 1902, by the provisions of the act of April 26, 1906. (34 Stat. 137-148.)

These provisions superseded those of the Choctaw-Chickasaw agreement as to citizens of the full

blood, and the alienation of their lands was prohibited for a period of 25 years after the approval of this act (sec. 19). The full-blood heirs of a deceased allottee were permitted to convey inherited lands subject to the approval of the Secretary of the Interior (sec. 22). The restrictions in the act of 1902 were still in effect when Congress passed the act of 1906, and the constitutionality of the latter act has recently been determined by this court in the case of *Marchie Tiger v. The Western Investment Co. et al.*, 221 U. S. 286.

That it is still the purpose of Congress to exercise its supervision over the Indians of the Five Civilized Tribes, and to enact such legislation for their protection as may seem wise and consistent with its long-continued policy is manifest in its last enactment. (Act of May 27, 1908.) This last act (sec. 9) provides "that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of the said deceased allottees: *Provided further*, That if any member of the Five Civilized Tribes of the one-half or more Indian blood shall die leaving issue surviving born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed

therefrom by the Secretary of the Interior in the manner provided in section 1 hereof, for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from restrictions: *Provided further*, That the provisions of section 23 of the act of April 26, 1906, as amended by this act, are hereby made applicable to all wills executed under this section."

This is the act, too (sec. 6), which makes the first appropriation for expenses in bringing the great number of suits, of which this is one, "to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or to clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to removal therefrom of restrictions upon the alienation thereof."

It is submitted that had Congress intended to permit the lands of members of the Choctaw and Chickasaw Tribes of Indians to be alienated by the heirs upon the death of the allottee either prior to the approval of the act of April 26, 1906, or subsequently, it would have been easy to have said so.

Such an intention is plainly disavowed, in so far at least as the lands inherited by Indians of the full blood are involved, by the subsequent legislation of 1906 and 1908.

A. N. FROST,

HARLOW A. LEEKLEY,

Special Assistants to the Attorney General. S

OCTOBER, 1911.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 405.

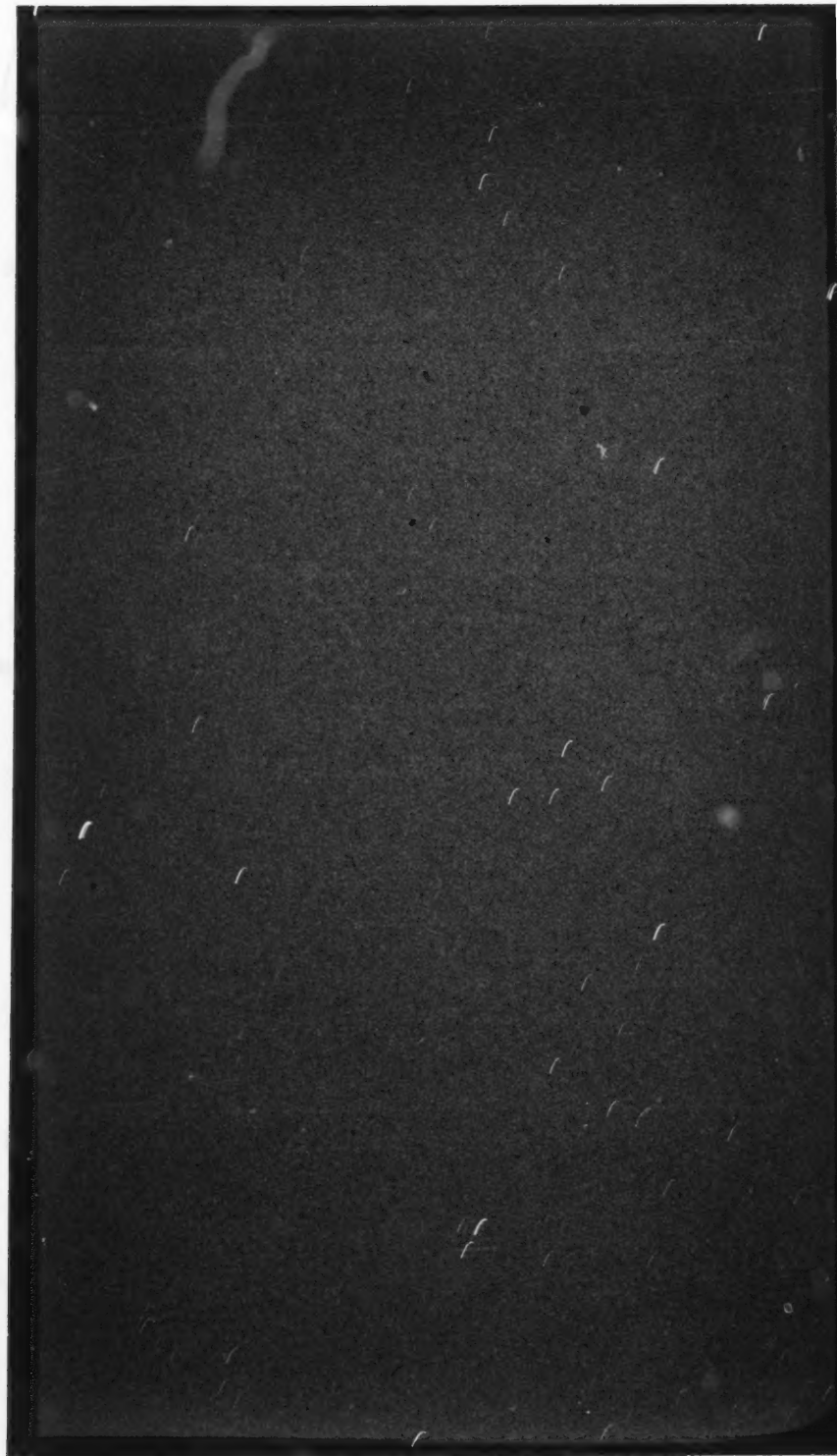
ALFRED F. GOAT ET AL, APPELLANTS,

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

FILED OCTOBER 3, 1910.

(22,334.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 405.

ALFRED F. GOAT ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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- 1 Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, A. D. 1910, of said Court, Before the Honorable William C. Hook and the Honorable Elmer B. Adams, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the seventeenth day of September, A. D. 1909, a transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The United States of America was Appellant and Alfred F. Goat, et al., were Appellees, which said transcript of record is in the words and figures following, to-wit:

- 2 In the Circuit Court of the United States, Eastern District of Oklahoma.

No. —.

THE UNITED STATES, Appellant,
vs.
ALFRED F. GOAT et al., Appellees.

The following is a transcript of such of the record and proceedings heretofore had in said case as has been ordered to be prepared and authenticated as necessary to the hearing in the Court of Appeals.

(a) The Bill of Complaint was filed in the office of the Clerk on the 23rd day of July, 1908, and, with the endorsements thereon, except as to which special orders of dismissal upon the petition of the complainant have been heretofore entered, is as follows:

- 3 In the Circuit Court of the United States for the Eastern District of Oklahoma.

In Equity. No. 359.

UNITED STATES OF AMERICA, Complainant,
vs.

ALFRED F. GOAT et al., Defendants.

To the Honorable Judge of the Circuit Court for the Eastern District of Oklahoma:

The United States of America, by Charles J. Bonaparte, Attorney-General of the United States, and William J. Gregg, United States

Attorney for the Eastern District of Oklahoma, brings this bill, upon the recommendation of the Secretary of the Interior, against:

4 Alfred F. Goat of Holdenville, Oklahoma, a citizen of the State of Oklahoma; S. C. Foreman of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Iowa Wry of Weoka, Oklahoma, a citizen of the State of Oklahoma; T. S. Hine of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; N. A. White of Sulphur, Oklahoma, a citizen of the State of Oklahoma; T. T. Godfrey of Holdenville, Oklahoma, a citizen of the State of Oklahoma; N. Bert Smith of Weoka, Oklahoma, a citizen of the State of Oklahoma; J. P. Davis of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Young Pepper of Frankfort, Oklahoma, a citizen of the State of Oklahoma; John Laborde and Frank Laborde of Earlsboro, Oklahoma, citizens of the State of Oklahoma; Chas. H. Weinberg of Wewoka, Oklahoma, a citizen of the State of Oklahoma; B. F. Davis and Donald Campbell of Wewoka, Oklahoma, a citizen of the State of Oklahoma; E. E. Jayne and John Silas of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Chas. O. Tate, of Wewoka, Oklahoma, a citizen of the State of Oklahoma; L. T. Sammons of Maude, Oklahoma, a citizen of the State of Oklahoma; T. T. Godfrey of Holdenville, Oklahoma, a citizen of the State of Oklahoma; Samuel Norton of Earlsboro, Oklahoma, a citizen of the State of Oklahoma; H. A. Ingram of Wewoka, Oklahoma, a citizen of the State of Oklahoma; R. H. McCormick and A. M. Seran of Wewoka, Oklahoma, a citizen of the State of Oklahoma; A. G. Mayhue of Seminole, Oklahoma, a citizen of the State of Oklahoma; L. B. Heliker and William Jarvis of Earlsboro, Oklahoma, citizens of the State of Oklahoma; W. B. B. Smith of Ft. Worth, Texas, a citizen of the State of Texas; Geo. J. Crump, Jr., of Harrison, Arkansas, a citizen of the State of Arkansas; T. S. Cobb of Wewoka, Oklahoma, a citizen of the State of Oklahoma; James A. Chapman of Holdenville, Oklahoma, a citizen of the State of Oklahoma; A. L. Reed of Wewoka, Oklahoma, a citizen of the State of Oklahoma; C. C. Crump and H. H. Rogers of Wewoka, Oklahoma, a citizen of the State of Oklahoma; John Cordell of Wewoka, Oklahoma, a citizen of the State of Oklahoma; R. L. Thurmond and Sam Pack of Wewoka, Oklahoma, citizens of the State of Oklahoma; Nancy Bruner of Earlsboro, Oklahoma, a citizen of the State of Oklahoma;

5 R. W. Blair and J. C. Greer of Martinville, Virginia, citizens of the State of Virginia; Harrison Street of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Frank H. Reed of Wewoka, Oklahoma, a citizen of the State of Oklahoma; L. C. Parmenter of Holdenville, Oklahoma, a citizen of the State of Oklahoma; Thomas Ragland of Konawa, Oklahoma, a citizen of the State of Oklahoma; O. D. Smith of Holdenville, Oklahoma, a citizen of the State of Oklahoma; M. L. Son of Wewoka, Oklahoma, a citizen of the State of Oklahoma; A. G. Mayhue of Seminole, Oklahoma, a citizen of the State of Oklahoma;

6 and thereupon your orator complains and says:

First.

Your orator shows that, pursuant to the terms of the treaties entered into between your orator and the Seminole tribe of Indians and the members thereof, your orator granted, by patent duly executed and delivered to the said Seminole tribe of Indians, certain lands located in the Indian Territory, now the eastern district of Oklahoma, and that by the terms of said treaties and of the laws of the United States, your orator solemnly obligated itself to secure and protect the said Seminole tribe of Indians and the members thereof in the possession, use and enjoyment of, and the title of the lands so granted to them, as aforesaid, and that, according to the terms of said treaties and of said acts of Congress relating thereto, and of the patent to said lands, the said Seminole tribe of Indians and every member thereof have at all times been, and now are, without power to dispose of any of said lands or of any interest therein without the consent and authority of your orator, or otherwise than in the manner prescribed by your orator. The lands hereinafter, in paragraph numbered six, described are a part of the lands aforesaid.

Second.

Your orator further shows that the sovereign, the Government of the United States, by reason of the helpless and dependent character of the Indian tribe- and nation-, and of the several members thereof within its borders, especially the Seminole tribe of Indians and the several members thereof, is the guardian, and has exclusive dominion over, and control of, the property of said tribe of Indians and of the several members thereof, especially the said Seminole tribe of Indians and the several members thereof, by virtue of which there is imposed upon your orator the duty to do whatever
7 may be necessary for their guidance, welfare and protection; that the said Seminole tribe of Indians has always been, and is now, recognized, treated and dealt with as a tribe of Indians by the Government of the United States and the several branches thereof; that said tribe of Indians is now under the care of an Indian Agent, duly appointed under the laws of the Congress of the United States; that the Congress of the United States still appropriates large sums of money for the benefit and protection of the said tribe of Seminole Indians and of the individual members thereof, and for the maintenance of schools for the education of the members of said tribe; that the Government of the United States, under and by virtue of the laws of the Congress of the United States, still has a large sum of money in its possession belonging to the said tribe of Indians, and that there still remains unallotted a large area of tribal lands, the common property of the said tribe.

Third.

Your orator further shows that in the exercise of its powers so to regulate, control and govern the affairs of the said Seminole tribe of Indians and the members thereof, having in view the welfare of

the said Indians and the carrying out of its treaty obligations, the Congress of the United States, by an act approved July 1, 1898, the same being found in 30 Statutes at Large, page 587, provided that the land belonging to the said Seminole tribe of Indians in the present State of Oklahoma should be allotted in severalty among the members thereof, but deeming the said Indians to be untutored and improvident and still requiring the protection and supervision of the General Government, it was provided by the said Act of July 1, 1898, that all contracts for sale, disposition or encumbrance of any part of any allotment made prior to the date of the patent should be void.

8

Fourth.

And your orator further shows that each of the tracts of land hereinafter, in paragraph numbered six, described is situated in the Eastern District of Oklahoma, and was, at the time of the transactions of sale or incumbrance mentioned in that paragraph, allotted lands of the members of the Seminole tribe of Indians, allotted to freedmen members of said tribe, and none were lands which had been patented to individuals at the time of the transactions in question; that they were not lands of heirs of allottees; that all contracts for the sale, disposition of any of said allotments prior to the date of patent were expressly, declared by law, to be void; that this law applied to all allotments of Seminole lands not inherited from allottees; that accordingly, defendants had knowledge and were, by said law, put upon inquiry and notice as to the inalienability of said unpatented lands, and had notice accordingly that the particular tracts had not been patented, any such patenting being a matter of public record and of public action; that moreover, the unpatented condition of said allotted lands was notorious and of common knowledge, since none of the Seminole allotted lands have been patented; and that other public laws of Congress and public agreements imposed further restrictions upon the transfer and incumbrance of the particular lands herein, in paragraph six, described, belonging to the particular class of tribal members herein mentioned, in addition to those arising from the absence of patenting, and these restrictions were known, notified and notorious in like manner.

9

Fifth.

Your orator further shows that each of the deeds, mortgages leases, contracts of sale, powers of attorney and other evidence of title to or incumbrance upon tracts of land as hereinafter set forth, was secured by defendants in defiant, wilful and open violation of law, and of the duty which rested upon this nation and every member thereof, and for the purpose of unlawfully incumbering said lands allotted to members of the said Seminole tribe of Indians, all of whom, under the treaties and laws of the United States, were without power or authority to sell, alienate or incumber said lands in any manner whatsoever.

And your orator further shows that by filing for record and causing to be recorded the said deeds and other instruments of writing, each of the defendants herein named has unlawfully obtained for himself an apparent title or interest of record to the land hereinbefore described, all of which was done in defiance of said agency supervision and in open violation and contempt of the laws of the United States, to the great detriment, irreparable injury and loss of said Indians, and in direct interference with the supervision and control policy and duty of the Government of the United States in that behalf, and in obstruction of the execution of the laws.

Sixth.

And your orator further shows that among said transactions were those hereinafter, under this sixth heading set forth. In such setting forth some abbreviations are employed for convenience, among others, the usual land office short descriptions by parts of sections; the letters N. E. S. W. signifying north, east, south, west; and the figures 2 and 4 signifying half and quarter sections, all the lands being sections of townships determined by the Indian Meridian of longitude; the word surplus is used to signify allot-

10 ment exclusive of homestead; one-half or other fraction blood signifies that the person has such a proportion of Indian blood of the tribe in which he is enrolled; the recording in books numbered 1, 2, 3, etc., or lettered, signifies recording in books of the recording districts of Indian Territory, when the date of recording given is prior to November 16, 1907, and to books of the register of deeds of the county of the State of Oklahoma when the date given is subsequent; the record of restrictions division gives petitions for removal of restrictions, and the action taken, or the fact that no action was taken.

11-30

List Number 1.

Seminole County.

Warranty Deed.

Lizzie Huddleson, (née Wisner) age 29, Seminole Freedman, Roll No. 2249, Holdenville, Oklahoma,

to

Alfred F. Goat, Holdenville, Oklahoma.

Consideration, \$300.00.

Dated March 8, 1907.

Recorded March 18, 1907.

Book R, page 30. Charles Rider, Notary Public.

S/2 and NE/4 SW/4, Section 23, Township 10 North, Range 5 East.

• • • • •

31-54

List No. 1.

Seminole County.

Warranty Deed.

Jack Warrior, age 32, Seminole Freedman, Roll No. 1945, Seminole,
Okla,

to

A. G. Mayhue, Seminole, Okla.

Consideration \$250.00.

Dated Aug. 31, 1906.

Recorded Sept. 1, 1906.

Book M, page 534.

W. E. Grisso, Notary.

W/2 SW/4 Section 9, Township 9 North, Range 7 East.

* * * * *

55

Seventh.

Your orator further shows that it is informed, and verily believes, and therefore charges the fact to be, that the defendants herein named and each of them has heretofore unlawfully secured from the members of said Seminole tribe of Indians other unlawful deeds, conveyances, mortgages, powers of attorney and contracts for and about their said allotments, which said Indians and freedmen had no authority to sell, alienate, dispose of, or contract about or incumber in any manner, as aforesaid, but that for the reason that such deeds, conveyances, mortgages, powers of attorney and contracts for and about their allotments have not been recorded by the said defendants, your orator is unable to give a minute and correct description of the same without the discovery from the defendants herein-after in this bill prayed; and that the said defendants herein named are continuing to induce the members of the said Seminole tribe of Indians named in this bill, and other members of the said tribe, to make, execute and deliver to them, the said defendants, and to take and accept from the said Seminole Indians deeds, conveyances, mortgages, powers of attorney and contracts for and about their allotments, and threaten, publish, announce and declare that they will continue such unlawful acts and doings. And your orator is informed and believes, and so avers, that said documents and, in many cases, possession of the lands are being, and are about to be, obtained by said defendants for wholly improper purposes, and in fraud of said Seminoles. And your orator further shows and avers that the defendants will so continue their unlawful acts and doings, and that their conduct, as specifically alleged in paragraphs five and six hereof, has, and their present and future conduct, as in

this paragraph alleged, will, if continued, greatly harass your orator in the discharge of its duty to and in the administration of its policy in relation to said Indians, and compel it to bring many suits in order to annul and set aside the said deeds, conveyances, 56 mortgages, powers of attorney, leases and contracts for and about the said lands, which the defendants have taken, are taking, and will continue to take, as herein alleged. And said defendants have been and are taking possession of many of said tracts, as your orator is informed and believes, but your orator cannot, within the limited time deemed best for the filing of this bill, ascertain clearly, and set forth the facts with regard to the possession of particular tracts.

Eighth.

And your orator further shows that, in addition to the instruments of writing hereinbefore mentioned and specified, upward of four thousand other instruments of writing, of a nature similar to those hereinbefore set forth, purporting to convey or to encumber or to affect the title of lands located within the eastern judicial district of Oklahoma and duly allotted to members of the Five Civilized Tribes, or belonging to said tribes, have been executed and placed on record by the defendants herein, and other persons and corporations in contravention of the treaties entered into between your orator and the said several Indian tribes and the laws of the United States, and your orator shows that unless it shall be permitted to join in its bills numerous defendants, against each of whom your orator has a like cause of action, and against each of whom your orator seeks the same relief, and whose pretended claims are based upon similar facts and involve precisely the same questions of law, your orator will be driven to the necessity of bringing a great number of separate and distinct suits, and that it will be practically impossible for your orator to prosecute, and for the court to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time.

Ninth.

Your orator further shows that under and by virtue of the aforesaid treaties and acts of Congress, all of the deeds and other 57 instruments of writing hereinafter mentioned constitute a damage to the titles of the said members of the said tribes, thereby greatly deteriorating the value of the interests of the said tribes and members of said tribes in their lands, and that defendants are interfering with the possession and rights of the said tribes and members of the said tribes to their said lands, and are seriously retarding the control and supervision of the Government over them, and are producing irreparable injury to your orator and the said tribes and members of said tribes. And your orator further shows that by reason of the duties, obligations and rights of the Government, as set forth in this bill, the Government is charged with the duty of protecting in the courts the rights of the said tribes and members thereof, and in that behalf is charged with a trust of a high and

delicate character, and that in the performance of these obligations and trust duties it is necessary to seek the aid of this court to the end that the defendants herein named should not only be ousted from the possession of the said lands, but that the court should order the said several deeds and instruments of writing herein specified and described to be surrendered and delivered up for cancellation and the record purged of the same; that the court should order the defendants to discover all facts relating to their possession of said lands, and to set forth all deeds, conveyances, mortgages, powers of attorney, and contracts in their possession other than those particularly mentioned and described in this bill, in order that the same may be cancelled.

Tenth.

Your orator further shows that it has joined in this bill of complaint numerous defendants for the purpose of avoiding a multiplicity of suits to recover the possession of the said lands for the benefit of the said tribes and members thereof, and for the purpose of
58 avoiding a multiplicity of suits to enjoin each of the several defendants herein from continuing to occupy the said lands and from taking any further deeds or other instruments of writing purporting to convey the title to said lands, and a multiplicity of suits to have the deeds and instruments of writing which they have induced the said members to make, ordered surrendered and delivered up for cancellation and the record purged thereof; that the interest of your orator, as guardian and trustee for the Indians, and as *parens patriæ*, is identical in all cases, and that the right of your orator for relief against the said several defendants is identically the same as against each, and the remedy against the said defendants hereinafter prayed for is precisely the same against each.

Forasmuch, therefore, as your orator is remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity where matters of this kind are properly cognizable and relievable, and to the end that your orator may have that relief which it can only obtain in a court of equity, and that each of the defendants herein named may answer the premises, the benefit whereof is expressly waived by your orator, your orator prays:

First. That this honorable court, by its decree, shall adjudge and declare the said several deeds, leases, instruments of conveyance and encumbrance described in paragraph numbered six of this bill, to be void and of no effect as instruments of conveyance, and that the same be cancelled and annulled and altogether held for naught, and that the title to the lands herein described be held and decreed to be in the allottees or their heirs, subject to the terms, conditions and limitations contained in the treaties, agreements and laws of the United States.

Second. That the defendants in this bill named shall be required to make a full and true discovery and disclosure of all posses-
59 sions, claims to possession, deeds, conveyances, mortgages, powers of attorney, contracts, and other instruments of writ-

ing in the possession or control of the said defendants, or which may have been made, providing for the sale and incumbrance of, or in any manner contracting for or charging or binding or attempting so to contract for, charge or bind the lands allotted to any of the members of the Seminole tribe of Indians or unallotted lands of the tribe, setting forth a list or schedule showing as to such deeds, conveyances, mortgages, powers of attorney, contracts and other instruments of writing, the full names of all the parties thereto, the dates thereof and a correct description of the land therein attempted to be conveyed, mortgaged or contracted about, and that each of the said defendants shall be required to surrender and deliver up to this honorable court all such deeds, conveyances, mortgages, powers of attorney, contracts and other instruments of writing so discovered and disclosed by them, and that this honorable court shall, by its decree, declare the same to be void and of no effect, and that the same shall be cancelled and annulled and altogether held for naught, and the title to the lands therein mentioned and described be held and decreed to be in the Seminole tribe or members thereof to whom they were allotted under the provisions of the said act of July 1, 1898, or any other act, subject to the treaties, agreements and laws of the United States; that all rights of and to possession shall be declared to be in said Indians, and that all defendants in possession or claiming possession, be ordered to vacate or cease making such claim; and that your orator may have such other and further relief in the premises as the nature and circumstances of this case may require, and as may be agreeable to equity and good conscience.

Third. That subpoenas and all *paper* process issue, making each and every one of the following named persons parties to said bill, and requiring each of them to appear upon a certain day and place, to be fixed by this honorable court, and answer fully the exigencies of this bill, but not under oath, which is hereby expressly waived.

60 Alfred G. Goat, S. C. Foreman, Iowa Wray, T. S. Hine, N. A. White, T. T. Godfrey, N. Bert Smith, J. P. Davis, Young Pepper, John and Frank Laborde, Chas. N. Weinberg, B. F. Davis, Donald Campbell, E. E. Jayne, John Silas, Chas. O. Tate, L. T. Sammons, Samuel Norton, H. A. Ingram, R. H. McCormick, A. M. Seran, A. G. Mayhue, L. B. Heliker, William Jarvis, W. B. B. Smith, Geo. C. Crump, T. S. Cobb, James A. Chapman, A. L. Reed, H. H. Rogers, John Cordell, R. L. Thurmond, Sam Pack, Nancy Bruner, R. W. Blair, J. C. Greer, Harrison Street, Frank Reed, L. C. Parmenter, Thomas Ragland, O. D. Smith, M. L. Son.

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CHARLES J. BONAPARTE,
Attorney-General,
By CHARLES H. RUSSELL,
Ass't Att'y Gen'l.,
WM. J. GREGG,
United States Attorney,
By HARLOW A LEEKLEY,
Ass't U. S. Att'y.

CHARLES H. RUSSELL,
United States Assistant Attorney-General, of Counsel.

62 UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

On this 21st day of July, 1908, personally appeared before me, Clerk of the Circuit Court of the United States within and for said District, Harlow A. Leekley, who, being first duly sworn, deposes and says that he is an assistant United States Attorney for the eastern district of Oklahoma; that he has read the foregoing bill by him subscribed, and knows the contents thereof, and that the matters therein stated upon knowledge he knows to be true, and those upon belief he believes to be true.

HARLOW A. LEEKLEY.

Subscribed and sworn to before me, this the 21st day of July, 1908.

[SEAL.]

L. G. DISNEY, *Clerk,*

By FLORENCE HAMMERSLY, *D. C.*

63-68 Endorsed as follows: No. 359. In the Circuit Court of the United States, Eastern District of Oklahoma. The United States vs. Alfred F. Goat, et al. Bill. Filed July 23, 1908. L. G. Disney, Clerk. By Florence Hammersly, D. C. Wm. J. Gregg, U. S. Att'y; Charles W. Russell, of Counsel.

* * * * *

69 No. 4.

In the Circuit Court of the United States for the Eastern District of Oklahoma.

No. 359. In Equity.

UNITED STATES OF AMERICA, Complainant,

vs.

ALFRED F. GOAT, et al., Defendants.

The Joint and Several Demurrer of Nancy Bruner, Thomas S. Cobb, George C. Crump, Donald Campbell, B. F. Davis, S. C. Foreman, L. B. Heliker, T. S. Hine, William Jarvis, Elmo E. Jayne, John Laborde, Frank Laborde, A. G. Mayhue, Sam Norton, Young Pepper, Sam Pack, L. C. Parmenter, Harry H. Rogers, Frank H. Reed, John Silas, W. B. B. Smith, L. T. Sammons, N. Bert Smith, O. D. Smith, Charles H. Weinburg, Thomas Ragland and M. L. Son.

To the Honorable Judges of the United States:

Now come the said defendants, Nancy Bruner, Thomas S. Cobb, George C. Crump, Donald Campbell, B. F. Davis, S. C. Foreman, L. B. Heliker, T. S. Hine, H. A. Ingram, William Jarvis, Elmo E. Jayne, John Laborde, Frank Laborde, A. G. Mayhue, Sam Norton, Young Pepper, Sam Pack, L. C. Parmenter, Harry H. Rogers, Frank H. Reed, John Silas, M. L. Son, W. B. B. Smith, L. T. Sammons,

N. Bert Smith, O. D. Smith, Charles H. Weinburg, Thomas Ragland and by protestation, not confessing any of the matters in the bill to be true, demur to the bill herein filed and say:

1st. That the same does not state any matter of equity entitling plaintiff to the relief prayed for.

2nd. That the facts as stated in said bill are not sufficient to entitle plaintiff to any relief against these defendants or either of them.

3rd. That the said plaintiff is shown by said bill to have no capacity to sue.

4th. That the plaintiff has a plain, adequate and complete remedy at law.

5th. That this Honorable Court has no jurisdiction of the subject matter of this action.

6th. That this Honorable Court has no jurisdiction of the parties to this action.

7th. That the bill is multifarious in this: That it joins the various defendants named in the bill as parties to the cause when it appears in the bill that each of the said defendants claims title to different and separate tracts or parcels of the land involved in the proceeding.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants joint- and several- demur thereto and they joint- and several- pray the judgment of this Honorable Court whether they shall be compelled to make any answer to the said bill and they joint- and several- humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

(Signed)

BEN B. BLAKENEY,

(Signed)

CRUMP, ROGERS & HARRIS,

(Signed)

OWEN, STONE & FLEMING,

Solicitors and Counsels for Defendants.

We hereby certify that the foregoing demurrer is in our opinion, well founded in point of law.

(Signed)

HARRY H. ROGERS,

Of Counsel for Defendants.

STATE OF OKLAHOMA,

County of Seminole, ss:

B. F. Davis being duly sworn, on oath, deposes and says: I am one of the above named defendants. The foregoing demurrer is not interposed for delay. That it is inconvenient, impracticable and would be duly expensive to procure the verification of each of the defendants herein demurring, to this demurrer because many of said defendants are non residents of said State of Oklahoma, many reside in remote rural districts and are not reasonably accessible within the time to file this demurrer; that I make this affidavit on my own behalf and on behalf of each and all of the other defendants in this action and named in this demurrer.

(Signed)

B. F. DAVIS.

Subscribed and sworn to before me this 3 day of September, 1908.

[SEAL.]

(Signed)

VERNON V. HARRIS,

Notary Public.

My commission expires April 18, 1910.

71 & 72 Endorsed as follows: No. 359. In the Circuit Court of the United States for the Eastern District of Oklahoma. United States of America, Complainant, vs. Alfred F. Goat, et al., Defendants. Demurrer. This may be filed A. N. Frost. Filed Oct. 5, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla. B. B. Blakeney, Harry H. Hegers, Owen, Stone & Fleming, Att'ys for defendants.

* * * * * * *

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(d)

Hearing.

And thereafterwards, on the 22nd., 23rd., and 24th., days of March, 1909, at the Court House at Muskogee, being days of the regular March term, present and presiding Honorable Ralph E. Campbell, said demurrers were then and there argued by counsel for the defendants and for the complainant, after which, said cause was taken under advisement by the Court.

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(c)

Opinion.

And thereafter, on the sixth day of August, 1909, it being a day of the regular McAlester term, at the Court House at Muskogee, after Court being opened in due form as of the McAlester sitting, present and presiding Honorable Ralph E. Campbell, Judge, the following opinion was read:

75

No. 284. In Equity.

THE UNITED STATES OF AMERICA, Complainant,
vs.

JAMES P. ALLEN et al., Respondents.

And Similar Cases.

Opinion.

The United States as complainants have filed in this court numerous bills, in each of which many individuals are made defendants. Each bill has relation to lands of one of the five Civilized Tribes. In the first paragraph of each bill, it is alleged that pursuant to the terms of certain treaties entered into between the United States and the tribe referred to, the United States granted by patent to each tribe certain lands in the Indian Territory, now the Eastern District of Oklahoma, and that by the terms of said treaties and the laws of the United States, the United States solemnly obligated themselves to secure and protect such tribe of Indians and the members thereof in the possession, use and enjoyment of and the title to said

lands, and that, according to the terms of said treaties and of said acts of Congress relating thereto, and of the patent to said lands, the said tribe of Indians and every member thereof, have at all times and are now without power to dispose of any part of said lands or of any interest therein without the consent and authority of the United States or otherwise than in the manner prescribed by the United States.

It is alleged that by reason of the helpless and dependent character of such Indians tribe and the several members thereof, the United States as the guardian have exclusive dominion over and control of the property of said tribe and the several members thereof by virtue of which there is imposed upon the United States the duty to do whatever necessary for the guidance, welfare and protection of such Indians; that said tribe has always been and is now recognized, treated, and dealt with as a tribe of Indians by the United States, under the care of an Indian Agent; that Congress still appropriates large sums of money for the benefit and protection of said tribe and the individual members thereof, and for school purposes; that the United States still have in their possession a large sum of money belonging to said tribe, and that there still remains unallotted a large body of land, the common property of such tribe.

Reference is then made to the act or acts of Congress under which the lands of such tribe have been allotted to the individual members thereof, subject to the various restrictions against the alienation thereby imposed. Paragraph IV of the bill then sets forth
76 the character of the land involved at the date of the conveyance sought to be cancelled, as to whether allotted or tribal. For convenience, the bills may be classified as follows:

Cherokee Nation.

No. 1. All cases of conveyance by allottees to defendants where restrictions will be removed July 27, 1908.

No. 2. All cases of land not allotted at the time of conveyance complained of, but sold by a person claiming a right to be enrolled, and later denied citizenship.

No. 3. Sales, without the approval of the Secretary, of lands inherited by full blood heirs. Before April 26, 1906.

No. 4. Same as above, after April 26, 1906.

No. 5. Homestead of freedmen.

No. 6. Conveyance by other than allottee covering land allotted at date of conveyance.

No. 7. Conveyance by other than allottee covering lands which were tribal at date of conveyance.

No. 8. Homesteads of Intermarried Whites.

No. 9. Mixed bloods. Homesteads of $\frac{1}{2}$ bloods and more, and surplus of $\frac{3}{4}$ blood and more.

No. 10. Full bloods, prior to April 26, 1906.

No. 11. Full bloods, after April 26, 1906.

In the Creek Nation the bills may be classified the same as above, except that there is no bill No. 8. In the Choctaw and Chickasaw Nations the bills may be classified as above. In addition, there is, as to these nations, a bill covering Choctaw and Chickasaw lands sold prior to the removal of restrictions under the Act of July 1, 1908. As to the Seminole Nation, the bills may be classified as follows:

Conveyances by freedmen after allotment and before issuance of patent;

Conveyances by full blood heirs; before issuance of patent.

Conveyances by mixed bloods before the issuance of patent.

Conveyances by other than allottees.

Conveyances by adopted citizens before issuance of patent.

Conveyance by full bloods.

77 It is to be noted that all the bills involve lands which had been allotted at the time of the conveyance complained of, except Nos. 2 and 7. None of the bills applying to the Seminole Nation involve unallotted lands. In class No. 2 it is alleged that the tracts of land involved comprise lands of the tribe which had never been allotted at the time of the execution and delivery and recording of the conveyances sought to be cancelled, but were then tribal lands, and that no individual, at that time, nor ever has had any separate ownership thereof, or right to transfer or incumber the same. In class No. 7 it is alleged that, at the date of the conveyance sought to be cancelled, the lands were tribal lands, but it is not alleged that they are still tribal and unallotted. Paragraph 5 of the bill then proceeds substantially as follows:

"Your orator further shows that each of the deeds, mortgages, leases, contracts of sale, powers of attorney and other evidence of title or incumbrance upon tracts of land as hereinafter set forth, was secured by defendants in defiant, wilful, and open violation of law, and the duty which rested upon this nation and every member thereof, and for the purpose of unlawfully incumbering said lands allotted to members of the said Seminole tribe of Indians, all of whom, under the treaties and laws of the United States, were without power or authority to sell, alienate, or incumber said lands in any manner whatsoever, and your orator further shows that by filing for record and causing to be recorded the said deeds and other instruments of writing, each of the defendants herein named has unlawfully obtained for himself an apparent title or interest of record to the land hereinbefore described, all of which was done in defiance of said agency supervision and in open violation and contempt of laws of the United States, to the great detriment, irreparable injury and loss of said Indians, and in direct interference with the supervision and control, policy and duty of the Government of the United States in that [behal^d], and in obstruction of the execution of the laws."

Paragraph 6 then sets forth in detail the various conveyances sought to be cancelled, involving numerous separate and distinct tracts of land in each of which conveyances, in most instances, the individual allottee or those claiming through him, appear as grantors, and one or more of the defendants appear as grantees.

Paragraph 7 alleges upon information and belief that the defendants have secured, or are proceeding to secure, other unlawful conveyances not now recorded, a minute description of which
78 the pleader alleges cannot be given without the discovery prayed for, and that the defendants are continuing to induce the members of the tribe to execute and deliver to them such conveyances, etc., and in many instances are taking possession of the lands covered by such conveyances for wholly improper purposes, and in fraud of the said tribe. The bill then proceeds:

"And your orator further shows and avers that the defendants will so continue their unlawful acts and doings and that their conduct as specifically alleged in paragraphs 5 and 6 hereof, as all their present and future conduct, as in this paragraph alleged, will, if continued, greatly harass your orator in the discharge of its duty to and in the administration of its policy in relation to said Indians, and compel it to bring many suits in order to annul and set aside the said deeds, conveyances, mortgages, powers of attorney, leases, and contracts for and about the said lands, which the defendants have taken, are taking, and will continue to take as herein alleged."

The bill then proceeds specifically as follows:

Eighth.

"And your orator further shows that, in addition to the instrument of writing hereinbefore mentioned and specified, upward of four thousand other instruments of writing, of a nature similar to those hereinbefore set forth, purporting to convey or to encumber or to affect the title of lands located within the Eastern Judicial District of Oklahoma, and only allotted to members of the Five Civilized Tribes, or belonging to said tribes, have been executed and placed on record by the defendants herein and other persons and corporations, in contravention of the treaties entered into between your orator and the said several Indian tribes and the laws of the United States, and your orator shows that unless it shall be permitted to join in its bill of numerous defendants, against each of whom your orator has a like cause of action, and against each of whom your orator seeks the same relief, and whose pretended claims are based upon similar facts and involve precisely the same questions of law, your orator will be driven to the necessity of bringing a great number of separate and distinct suits, and that it will be practically impossible for your orator to prosecute and for the court to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time."

Ninth.

"Your orator further shows that under and by virtue of the aforesaid treaties and acts of Congress, all of the deeds and
79 other instruments of writing hereinafter mentioned constitute a damage to the titles of the said members of the said tribes, thereby greatly deteriorating the value of the interests of

the said tribes and members of said tribes in their lands, and that defendants are interfering with the possession and rights of the said tribes and members of the said tribes in their said lands, and are seriously retarding the control and supervision of the Government over them, and are producing irreparable injury to your orator and the said tribes and members of said tribes. And your orator further shows that by reason of the duties, obligations, and rights of the Government, as set forth in this bill, the Government is charged with the duty of protecting in the courts the rights of the said tribes and members thereof, and in that behalf is charged with a trust of a high and delicate character, and that in the performance of these obligations and trust duties it is necessary to seek the aid of this court to the end that the defendants herein named should not only be ousted from the possession of the said lands, but that the court should order the said several deeds and instruments of writing herein specified and described to be surrendered and delivered up for cancellation, and the record purged of the same; that the court should order the defendants to discover all facts relating to their possession of said lands, and to set forth all deeds, conveyances, mortgages, powers of attorney, and contracts in their possession, other than those particularly mentioned and described in this bill, in order that the same may be cancelled.

Tenth.

"Your orator further shows that it has joined in this bill of complaint numerous defendants for the purpose of avoiding a multiplicity of suits to recover the possession of the said lands for the benefit of the said tribes and members thereof, and for the purpose of avoiding a multiplicity of suits to enjoin each of the several defendants herein from continuing to occupy the said lands and from taking any further deeds or other instruments of writing purporting to convey the title to said lands, and a multiplicity of suits to have the deeds and instruments of writing which they have induced the said members to make, ordered surrendered and delivered up for cancellation and the record purged thereof; that the interest of your orator, as guardian and trustee for the Indians and as *parens patriae*, is identical in all cases, and that the right of your orator for relief against the said several defendants is identically the same as against each, and the remedy against each of the said defendants hereinafter prayed for is precisely the same as against each.

80 For as much, therefore, as your orator is remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable, and to the end that your orator may have that relief which it can only obtain in a court of equity, and that each of the defendants herein named may answer the premises, the benefit whereof is expressly waived by your orator, your orator prays: * * *

The prayer of each bill is, first, that the conveyances set forth in paragraph six shall be decreed to be void and of no effect as instruments of conveyance and shall be cancelled, and that the title

to the lands therein described be held and decreed to be in the allottee or their heirs, subject to the terms, conditions, and limitations contained in the treaties, agreements, and laws of the United States. It is further prayed that the defendants shall be required to make discovery and disclosure of all other possessions, claims to possession, deeds, conveyances, mortgages, powers of attorney, contract and other instruments of writing, setting forth a list or schedule thereof in their possession, conveying the lands allotted to any of the members of the said tribe, or unallotted lands of the said tribe; and that the defendants be required to surrender and deliver up to the court all such deeds, etc.; and that the same be cancelled, and such lands decreed to be in tribe or members thereof to whom they have been allotted; and that all defendants in possession or claiming possession thereof be ordered to vacate or cease making such claim; and then follows the usual prayer for subpoena.

Many of the defendants filed demurrers to these bills, and a date was set by the court for hearing arguments thereon, and all such demurrers were presented at the same time, fully argued by counsel, and thereupon submitted to the court. The demurrers set up many grounds, the main ones of which are in substance as follows: That the court is without jurisdiction; that the bill of complaint fails to show any such interest in the plaintiff as would entitle it to maintain these suits; because the plaintiff has no capacity to maintain these suits; because the bill of complaint is wholly devoid of equity; because by said bill it is sought to quiet title to land of which the plaintiff is not now and has never been in possession; because there is a defect of parties to these suits; because there is a misjoinder of alleged causes of action in this: That the alleged cause of action against each defendant is improperly joined with

81 that of numerous other defendants or any joint occupation of interest as between the defendants or any joint occupation of the property or any reason that would authorize the joint suit alleged; because the bills are multifarious; because the bills do not disclose such a state of facts as entitle plaintiff to recover in any event.

While a few of the bills filed relate to transactions alleged to have taken place prior to allotment of the lands involved, it appears that such lands have since been allotted, and we have now to consider only lands of the Five Civilized Tribes allotted to citizens thereof.

The contention that the Court has no jurisdiction is unsound, if the United States are properly parties plaintiff, because wherever the United States appear as parties plaintiff or petitioners, the Circuit Court of the United States has jurisdiction. Constitution, Art. 3, Sec. 2, Clause 1. Act of Congress of '87-8, 25 Stat. at Large, 433.

The question of the capacity of the United States to sue involves the question as to whether they have such an interest in the controversy as will entitle them to maintain the suits, for unless they have such interest, either by way of title in the land, or duty or obligation in relation to the allottees and the lands involved, the demurrers on this point must be sustained. In *United States vs.*

San Jacinto Tin Co., 125 U. S. 273, a suit to annul and set aside a patent, the court says:

"But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of these other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States, and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, 82 or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

Has the government any interest, by way of ownership of or title to these allotted lands? They were originally granted by patent to the respective tribes, to be owned and held by them while their tribal relations should exist, or until they should abandon the same. The treaty with the Choctaws provided that the land should be granted to them "in fee simple to them and their descendants, to enure to them while they should exist as a nation and live on it." (Kappler, p. 311, 7 Stat. 333) This same title was vested in the Chickasaws, (Kappler 11 Stat. 573) By treaty with the Cherokees (7 Stat. 478), it was agreed that the lands ceded to them should be conveyed to them by patent, according to the provisions of the act of May 28, 1830, above referred to, and patent was issued accordingly. By treaty with the Creeks, it was provided that the lands assigned them should be granted by patent in fee simple, and that the right thereby granted should be continued to said tribe so long as they should exist as a nation and continue to occupy the same. (7 Stat. 417). By treaty of 1866 (14 Stat. 755), the United States granted and sold to the Seminole Nation the major part of it not all of the land now allotted to them, for the sum of fifty cents per acre, a total sum of a hundred thousand dollars. This appears to have been an unconditional grant, The above land so, granted to the several tribes was occupied by them in their tribal capacity until the allotment of these lands in severalty to the individual members, with the consent of the government, so that the tribal extinction or abandonment contemplated in the treaties is no longer to be considered. Since the utmost interest by way of title which it can possibly be contended remained in the government was the possibility of its reverting upon such tribal extinction or abandonment, it fol-

lows that no vestige of title to these lands now remains in the United States. These lands are now allotted lands for which allotment certificates have been issued, followed, in many instances, by patent, so that the equitable title at least has passed to the individual allottees. (*Wallace vs. Adam*, 143 Fed. 716).

Under the general allotment act, where the title passes direct from the government to the allottee, the issuance of patent passes title to the allottee in fee simple, and under no circumstances does it revert to the United States. *Schrimsher vs. Stockton*, 183 U. S. 290. There is less reason why it should revert here.

83 It follows that the complainant can claim no such interest by way of title to these lands as would entitle it to maintain these suits.

In the act of Congress approved May 27, 1908, relative to the removal of restrictions is found the following provision:

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same in cases where deeds, leases or contracts or any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof: such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act."

It is contended that this provision confers upon complainant authority to institute and maintain these suits in the name of the United States. The dominant purpose of this provision seems to be to preclude any such construction of the act as would deny the United States the right to bring such suits referred to, rather than to confer such right. The bill, as originally introduced, did not contain this provision. On February 10, 1908, at the same session, a bill was introduced by Mr. Sherman, in the House, and Senator Clapp, in the Senate, specifically conferring upon the Attorney General the right to bring such suits in the name of the United States, "for the use and benefit and on behalf of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes, or any enrolled member of either thereof." This bill covers over six pages, providing in detail for the conduct of such suits, and also providing for the transfer from the state to the federal courts of such suits in which the United States may become a party, as provided in the bill. This bill did not become a law. After its introduction and while the committee on Indian Affairs was considering the act of May 27, 1908, the Assistant Attorney General, for the Interior Department, appeared before the committee (Report of Committee on Indian Affairs for March 20, 1908), stating that the department was in favor of the bill under consideration, but calling attention to the jurisdictional bill above referred to, saying that "the Department believes that some provision

for jurisdiction should be passed with the other bill, for these reasons, briefly, that if it is not necessary, it could do no damage."

84 He then referred to a number of cases arising in the state courts, wherein he deemed it advisable that provision be made for removal to the federal court. He said "the Department feels that if the restrictions bill should be passed separately that there would be no possible chance, perhaps, to enact this other bill, because the term is approaching its end, and it is very difficult to get legislation when there is any direct active opposition to it. That being the history of such efforts it is the feeling of the Department that the two should be passed together."

Then followed a lengthy discussion between the representatives of the Department and members of the committee, relative to incorporating such jurisdictional provisions. It was conceded that without such provision, the existence of the authority and jurisdiction was not without question, the Assistant Attorney General insisting, however, that it already existed. Three of the Oklahoma representatives on the committee opposed the incorporation of a measure granting additional jurisdiction, insisting that only such powers and jurisdiction as already existed by virtue of the enabling act and other legislation should be exercised by the federal government, and conceded that if they existed, their exercise was proper. Finally the paragraph now being considered was incorporated.

The jurisdiction bill which failed was one positively and specifically conferring the authority and jurisdiction as if they had not theretofore existed. This provision is negative in its terms, not purporting to confer the right, but disavowing any intention to deny the same. Therefore, it can hardly be said that these eleven lines were incorporated in this bill in lieu of the jurisdiction bill containing over six pages.

In view of this legislative history, it is my opinion that it was only intended by this paragraph to provide that if by existing legislation the United States had authority to institute and maintain such suits, it was not the desire nor the intention of Congress for this act to deny it, and it should not be so construed. It is urged that the appropriation of money for such suit is a legislative recognition of their validity. In my judgment, it cannot be so construed in this case. It is the expressed purpose of Congress not to deny the right if it existed. A refusal to provide money for the conduct of such suits would have prevented their institution and maintenance, resulting the same as a denial of the right. Hence the appropriation. The authority of the complainant to maintain these suits, if it exists, must be found elsewhere.

85 In the recent opinion of this court, overruling the demurrers in the town lot cases, the history of these Indians was thus reviewed:

"In the early part of the last century the Creek, Cherokee, Chickasaw, Choctaw, and Seminole tribes of Indians, known as the Five Civilized Tribes, occupied in their tribal capacity various portions of the states east of the Mississippi River. The growth and development in these then new states had caused the conflict between the

advancing civilization of the white man and the habits and customs of these tribes to become more marked. The Indians as a rule were not then sufficiently advanced toward the civilization of their white neighbors to adapt themselves to the new order of things, and to merge these tribes into the body politic of the state was found to be impracticable. It was therefore apparent to Congress that some disposition of these Indians must be made. The plan of giving them in exchange for their lands east of the Mississippi, portions of the public domain west of the Mississippi, where, as it then appeared, they would be undisturbed by the encroachment of white men for years to come, was finally devised, and on May 28, 1830, an act of Congress was passed (4th Stats. at Large 411) providing that the President might cause the country west of the Mississippi, not within any state or organized territory and to which the Indian title had been extinguished, to be divided up into districts for the reception of such tribes or nations of Indians who might choose to exchange lands then occupied by them for such districts and remove thereto. This act contained the following provisions:

“SEC. 3. And be it further enacted, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided, always, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same.”

Referring to the above act of Congress, it was said by Mr. Justice Davis, in the *Kansas Indians*, 5 Wallace 737.

“The well defined policy of the Government demanded the removal of the Indians from organized states, and it was supposed at the time the country selected for them was so remote as never to be needed for settlement, etc.”

86 The Senate Committee, whose report is quoted in *Stevens vs. Cherokee Nation*, 174 U. S. 448, took occasion to say, with reference to the Five Civilized Tribes:

“This section of country was set apart to the Indian, with the avowed purpose of maintaining an Indian community beyond and away from the influence of white people. We stipulated that they should have unrestricted self-government and full jurisdiction over persons and property within their respective limits, and that we would protect them against intrusion of white people, and that we would not incorporate them in a political organization without their consent. Every treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of the Indian from the whites, and non-participation by the whites in the political and industrial affairs. We made it possible for the Indians of that section of country to maintain their tribal relations and their Indian polity, laws and civilization if they wished so to do. And, if now, the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a population

of strangers five times in number to their own, it is not the fault of the Government of the United States, but comes from their own acts in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction, to become traders, farmers, and to follow professional pursuits.

It must be assumed in considering this question that the Indians themselves have determined to abandon the policy of exclusiveness, and to freely admit white people within the Indian Territory, for it cannot be possible that they can intend to demand the removal of the white people either by the Government of the United States or their own. They must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time, it was abandoned forever."

It is common knowledge of persons conversant with local history that the situation had become such in 1893 that Congress decided that existing conditions should be changed, and that steps should be taken looking to ultimate statehood for Indian Territory and its inhabitants, Indian as well as white. By the appropriation act of that year, 27 Stat. at Large 612-645, a committee consisting of three members was provided for, to enter into negotiations with these tribes for the purpose of the relinquishment of the tribal title and the allotment of the lands in severalty to the individual members, having in view the ultimate creation of a state or states of the union

87 which would embrace these lands. Up to this time, the policy of the government had been to exclude white persons from these lands and from commingling with these Indians, but experience had shown this could no longer be done. The Indians themselves, by permitting intermarriage and by various ways, had defeated the governmental policy, and the white non-citizen population in the Indian Territory greatly outnumbered the Indians, and were constantly increasing. They were not amenable to the Indian Government. The Indian governments were far from satisfactory to the Indians themselves. Such was the condition that the Senate committee was forced to report:

"It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government cannot be continued; it is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change cannot be much longer delayed. There can be no modification of the system. It cannot be reformed; it must be abandoned and a better one substituted." *Stephens vs. Cherokee Nation, supra, p. 451.*

This was the situation which forced Congress to a radical change of policy and a determination to effect a state government for Indian Territory as soon as it could be accomplished consistent with the rights and interest of the Indians. In the Indian Appropriation Act of 1896 (29 Stat. 321) Congress said:

"It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory, and afford needful protection to the lives and property of all citizens and residents thereof."

The work of preparing for this change fell upon the commission, first known as the Dawes Commission, and, latterly, as the Commission to the Five Civilized Tribes, acting under successive Congressional enactments and agreements with the tribes. The titles to the lands occupied by the various tribes vested in the respective tribes, and not in the individual members. *Cherokee Nation vs. Journey-ake*, 155 U. S. 196; *Shulthis vs. MacDougal*, 162 Fed. Rep. 331.

The work of the committee was first to determine who were the members of the tribes, and then to effect a division or allotment of the lands among them. Agreements were entered into with the various tribes, pursuant to which this allotment of lands was made.

88 In most instances the allottee took his land subject to restrictions upon alienation or incumbrance for a specified time, and it is the alleged sales or other disposition of such lands by the allottee before the expiration of the restriction period that has given rise to most of the suits now being considered. Their purpose is to restore to him the possession where he is not now in possession, and to cancel and annul, as a cloud upon the title, all instruments involved in such sales or disposition. It is clear, therefore, that the allottee himself is vitally interested in the relief sought. Are his personal status and his relations to the United States such that these suits may be maintained solely in the name of the United States? As to his personal status, a pertinent inquiry is,

Are the members of the Five Civilized Tribes citizens of the United States? At the time they were granted the land comprising the Indian Territory and during all the years they held the same up to the time when Congress first took active steps to effect an allotment in severalty, they were not citizens of the United States. *Elk vs. Wilkins*, 112 U. S. 99.

In the act of Congress of May 2, 1890, 26 Stat. 99, establishing United States court in Indian Territory, it was provided that "Any member of any Indian tribe or nation, residing in the Indian Territory, may apply to the United States Court therein to become a citizen of the United States, and such court shall have jurisdiction thereof and shall hear and determine such application, as provided in the Statutes of the United States." But few Indians availed themselves of this privilege.

In the Indian Appropriation Act of March 3, 1893, 27 Stats. 645, is found the following provision:

"The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

In the general allotment act of 1887 these Indians had been specifically excluded from its provisions. The act provided
89 that those Indians receiving allotments under its terms should become citizens of the United States. Now, six years later, Congress, by the section just quoted, consents that the Five Civilized Tribes may allot lands in severalty to each of their members, as they may deem proper, and upon such allotment extends to such allottees the right of United States citizenship in all respects.

Section 16 of the same act provides for the Commission to the Five Civilized Tribes to enter into negotiations with the tribes for the purpose of the extinguishment of the national or tribal title to their lands and the allotment of the same in severalty to the individual members, with the view to such an adjustment upon the bases of justice and equity, as met with the consent of such nations or tribes of Indians, so far as may be necessary, requisite, and suitable to enable the ultimate creation of a state or states of the union, which shall embrace the lands within said territory. The consent to allotment expressed by Congress in section 15 was necessary, because under the grants conveying these lands to the tribes, they could only be held by the Indians in their tribal capacity until such time as Congress should consent to a different holding. Sections 15 and 16 should be construed together. The purpose of Congress, as repeatedly expressed in this act, was to make an equitable division of the tribal or communal property both personal and real, among the individual members of the tribes, to the end that a state might be formed. To do this, the title had to be changed from tribal to individual, and Congress cleared the way for such distribution of property by consenting thereto. The tribes were then free to make such division, should they desire to do so, and it was the office of the Commission to endeavor to procure their consent to do so. The motive of Congress was to secure ultimate statehood, of which state the Indians should be citizens. It is of course presumed that Congress in this legislation had in view what it conceived to be the greatest good to all concerned. It was not disposed to force statehood upon these people, even if it could have done so. But it could and did take the lead in two very important steps, looking to statehood, that of consenting to allotment and extending to allottees the privileges and immunities of United States citizenship. This was in 1893. It is now a matter of common knowledge that the Commission experienced many difficulties in reaching agreements with the tribes and much delay followed. It developed that it had a work of much more magnitude than had first been contemplated, and, from time to time, Congress enlarged its scope, and by
90 successive acts provided more in detail for the accomplishment of allotment and division of the lands. In 1901, its work was still unfinished; in fact, it was then just well begun. As yet but few of the Indians had taken their allotments, and as these were not taken under the scheme provided by the act of 1893, it is doubtful whether they thus became citizens. By the act of Congress of March 3, 1901, 31 Stat. 1447, section 6 of the general allotment act of 1887 was amended by inserting the words "and

every Indian in Indian Territory." So that the portion of the act relating to citizenship read "and every Indian born within the Territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, and every Indian in Indian Territory, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Section 8 of the Act of 1887 as originally passed, read as follows:

"That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miami's, and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order." Kappler's Laws, Vol. 1, 35.

It is contended that the amendment of 1901 made the act ambiguous and contradictory. It must be presumed that Congress had in mind all the terms of the act that was amended. It is clear that Congress meant to say and did say by the Amendment "every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens * * * without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The language is clear, and its intent and meaning cannot well be mistaken, and if in the other parts of the act as originally passed there are found provisions in conflict with the clear purpose and intent of the amendment, they are in my judgment, so far as they conflict with the amendment, repealed by implication; but attention is called to the fact that section 6 was again amended by the act of May 8, 1906, 34 Stat. 182. It is clear that the main purpose of this amendment was to provide that the allottee under the general allotment act of 1887 should not become a citizen of the United States upon delivery of the trust patent, but that such citizenship should be deferred until delivery of patent in fee simple. It is also observed that the words "and every Indian in Indian Territory," constituting the amendment of 1901, are omitted, and the section as amended is made to include this provision, "and provided, further, that the provisions of this act shall not extend to any Indians in the Indian Territory."

At the same session and only a few days before Congress had passed an act providing for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory, and was then considering the Oklahoma Enabling Act, which was passed shortly afterwards.

It was natural, therefore, that having specially legislated for the Five Civilized Tribes, they should in amending this general allotment act exclude therefrom all reference thereto. But the status of United States citizenship had attached to the individuals of the Five Civilized Tribes by the amendment of 1901. Without determining whether Congress could, without the consent of a citizen of the United States and without any act on his part forfeiting the same, withdraw such citizenship, it will not be presumed that Congress even intends to do so, except where such interest is expressed in clear and unmistakable terms, and, in my judgment, the amendment of 1906 does not admit of such construction.

On June 16, 1906, Congress passed the Oklahoma Enabling Act, in the preamble of which it is described as "An Act to enable the people of Oklahoma and the Indian Territory to frame a constitution and state government, and be admitted into the Union on an equal footing with the original states."

In this act it was further provided "that the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as herein-after provided." And in that act it was further provided:

That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory and Oklahoma, and
92 who have resided within the limits of said proposed state for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed state; and all persons qualified to vote for said delegates shall be eligible to serve as delegates."

Whether the Indians of the Five Civilized Tribes at the time of the passing of the Enabling act were citizens of the United States or not, its terms clearly make them electors and give them the right to participate in the formation of the state constitution and state government, if they were inhabitants of the area in the proposed state, and are members of Indian nations or tribes. In fact, several of them were members of the Constitutional Convention. The constitution framed pursuant to the Enabling act provides that the qualified electors of the state shall be made citizens of the United States, male citizens of the State, and male persons of Indian descent, native of the United States, who are over the age of 21 years, etc. Upon submission of the constitution, as provided in the Enabling act, the President of the United States proclaimed statehood. The members of the Five Civilized tribes participated in all state, county and municipal elections; hold state and county officers; a member of the Chickasaw nation is now a representative in Congress, and a member of the Cherokee nation is now a United States senator from Oklahoma. In *Boyd vs. Thayer*, 143 U. S. 170, it is said,

"Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafterwards be controlled, and it also involves the adoption as citizens of the United States of those whom

Congress makes members of the political community; and who are recognized as such in the formation of the new state with the consent of Congress."

In my judgment, therefore, the members of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges and immunities of citizenship. I am not unmindful of the fact that Congress by joint resolution of March 2, 1906, continued the tribal governments "in full force and effect for all purposes under existing laws, until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members." And that by act of Congress approved April 26, 1906, tribal existence was continued in full force and effect for all purposes authorized by law until otherwise provided by law."

But by various and successive acts of Congress these tribes have been shorn of their governmental functions; their courts
93 have long been abolished; their principal chief, or governor, as the case may be, is subject to removal by the President, who may fill the vacancy by appointment. Provision is made that their public school system shall be superseded by the state public school system; tribal tax is abolished; provision is made for the sale of their public buildings and lands; their legislature shall not be in session for a longer period in any one year than thirty days, and no act, ordinance, or resolution thereof except resolutions of adjournment, are valid without approval by the President. In *Buster vs. Wright*, 135 Fed. 951, Judge Sanborn said:

"Between the years 1888 and 1901, the United States, by various acts of Congress deprived this tribe (Creeks) of all its judicial power and curtailed its remaining authority until its powers of government have become the merest shadows of their former selves."

So it is with all the Five Civilized Tribes; but there is still undistributed tribal property, and until this is divided, it is essential that the tribal entity shall be maintained. In my judgment, the existence of this undistributed tribal property was the main reason for continuing the tribal existence, and such must have been the principal motive actuating Congress when the resolution of March 2, 1906, was passed, providing for the continuance of tribal existence "until all property of such tribe, or the proceeds thereof, shall be distributed among the individual members of said tribes." It is a continuance of the tribe in mere legal effect, just as in many states corporations are continued as legal entities after they have ceased to do business, and are practically dissolved, for the purpose of winding up their affairs. It is not in my judgment a tribal existence incompatible with the enjoyment of full citizenship in the United States by the members of the tribes. Nor does the fact that these Indians have had restrictions upon alienation imposed upon their allotments necessarily affect their political status as United States Citizens. In *Re Heff*, 197 U. S. 508.

Can the right to maintain these suits be based upon treaty provisions relating to the protection of these Indians in their possession of the lands originally granted to the tribes? The grants of land made under the act of Congress of May 28, 1830, (4 Stats., 411)

and the treaties entered into pursuant thereof, were to the tribes as such, and not to the individual members. This is clear from the fact, as we have seen, that it was then contemplated that these lands were so remote that they would never be desired for white settlement.

94 It was then the policy of the government to perpetuate the existence of the tribe, and there was no thought of tribal dissolution and the individual holding of the land. The Guarantees in the treaties related to tribal protection, and in my judgment cannot be invoked by the individual allottee under the changed conditions now existing. They imposed no duty or obligation upon the United States upon which these suits may be based.

The trust relation of the government recognized in *Beck vs. Flournoy Co.*, 65 Fed. 30, and kindred cases, known as the *Flournoy cases*, as arising from the fact that the legal title to the lands there involved was still retained in the government, does not exist here. It is alleged that by reason of the duties, obligations, and rights of the government, as set forth in this bill, the government is charged with the duty of protecting in the Courts the rights of the said tribes and members thereof, and in their behalf is charged with a trust of a high and delicate character. This is but a repetition of the allegations of guardianship, and we have now to consider whether in view of existing legislation and the present status of the individual allottee of either of the Five Civilized Tribes, these suits may be maintained by the United States as guardian for the Indian, acting in his stead, and without making him a party.

Does the relationship of guardian and ward now exist between the United States and the allottee with reference to his restricted land, in the sense originally recognized between the United States and the tribe and members thereof, with reference to tribal property? The theory upon which this relation of guardianship arose and was recognized for so many years is well stated in the *United States vs. Kagama*, 118 U. S., at page 383, *at seq.*, as follows:

"These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owed no allegiance to the States, and received from them then no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

* * * The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

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It is evident the court has in mind the tribal Indians, "communities dependent upon the United States. Dependent largely for their daily food. Dependent for political rights. They owed no allegiance to the States, and received from them no protection." To this class of Indians the court say there arises the duty of protection, and with it the power. Congress and the courts have long recognized the relation of guardianship in such case, and such a relation was recognized as existing over the Five Civilized Tribes before the allotment, and in my judgment so exists now, with reference to tribal property. *Choctaw Nation vs. United States* 119 U. S. 1.

The relation of guardianship is not established by Congress expressly saying in any particular act, "the United States is hereby declared to be the guardian of the Indians," but was deduced by the courts from a consideration of natural conditions and constitutional and legislative provisions, as being that most nearly approaching the peculiar relation existing between the United States and the Indian tribes when the matter was first presented for judicial consideration. (*Cherokee Nation vs. Ga.*, 5 Peters 1) and of course recognized as continuing so long as the conditions giving rise to it existed. But Congress may terminate this relation at any time. As said by Mr. Justice Brewer, in the *Heff* case, (197 U. S. 499):

"Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one sui juris. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true, there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear, the question is at an end."

Whether the relation is now terminated or materially changed by Congress, we are to determine from a consideration of recent
96 legislation and change wrought thereby. As the relation was not established by any express provision, neither is it necessary to its termination. These allottees are now citizens of the United States and citizens of the State of Oklahoma. (*Slaughter House Cases* 16 Wallace, 36). As such they have the right to make and enforce contracts; to sue; be parties; give evidence, and to inherit, purchase, lease, sell and convey property. *Civil Rights Case* 109 U. S. 1. The fact that the allottee holds land all or a part of which is alienable for a fixed period does not affect his civil or political status. In *re Heff*, *supra*. Nor does it follow that because as a citizen he may make contracts generally with reference to his property, that he may therefore dispose of restricted lands before the expiration of the restricted period. *Flournoy cases, supra*.

In 19th Opinions of Attorneys General, at page 232, Mr. Garland said of the effect of the general allotment act of 1887, whereby individual allottees were given the right of occupancy of separate

tracts, the title to which the Governments held in trust for twenty-five years:

"In this new mode of life, the guardianship which heretofore has been exercised over the tribe is to be transferred to the individual allottees provided for in this act. * * * Prior to the issuing of the second patent, the United States is to act as trustee of the lands. This relation as to the lands is substituted for the guardianship heretofore exercised over the tribe."

United States vs. Dooley, 151 Fed. 697, was a recent case instituted in the United States circuit court, E. D. Washington, by the Government in its own behalf to cancel a deed made by Susan Swasey, an allottee holding a trust patent, to the other defendants. The Allottee, Susan Swasey, is made a party defendant. Concerning the relation of the allottee to the Government, the Court says.

"The contention that the relation of guardian and ward exists between the complainant and the allottee cannot be sustained, for the statute terminated that relation, at least in so far as it affects her personal acts and political status as an Indian. Such was the holding in the Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848. The argument that the same relations exists between the Government and the Indians since as before the passage of the act was answered by Mr. Justice Brewer in delivering the opinion of the court as follows: 'But the logic of this argument implies that the

97 United States can never release itself from the obligation of guardianship; that, so long as an individual is an Indian by descent, Congress, although it may have granted all the rights, and privileges of national and therefore state citizenship, the benefits and burdens of the laws of the state, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the state, and release him from obligations of obedience thereto. Can it be that, because one has Indian and only Indian blood in his veins, he is to be forever one of a special class over whom the general government may in its discretion assume the rights of guardianship which it had once abandoned, and this whether the state or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound.'

The right to main the suit must therefore rest upon other grounds [that] that of the relation of guardian and ward, but it does not follow that because such status has been abolished that the government is remediless. The authority rests upon another well defined principle. The complainant is still vested with the legal title to the land, etc."

In *Ex parte Savage*, 158 Fed. 205, Judge Pollock, of the Kansas District, said:

"Since the decision by the supreme court in the case in *Re Heff* * * * it cannot be doubted, I think, under act of Congress of February 8, 1887, * * * when Indians have been allotted in severalty and have received their patent, they are no longer wards of the government, but are citizens of the United States and of the state in which they reside, and are entitled to all the rights, guaranteed to citizens of such state."

In the act of 1887 not only were the allottees restricted from selling the lands but the legal title thereto was reserved in the United States during the restriction period. The allottees here involved are restricted from selling for a fixed period, but the title is not reserved. Certainly if in the former case the relation of guardian and ward does not exist, it does not in the latter, unless for some other reason. Had it been the desire of Congress and the Five Civilized Tribes that the trust relation provided in the general allotment act should prevail here, it could readily have been accomplished by providing that the title should be held in trust by the tribe for the restricted period, to be finally patented to the allottees free from incumbrance, etc. The trust relation of the tribe and the un-

98 questioned right of the government to control tribal property would, in my judgment, have entitled the United States to sue in behalf of the tribe to cancel any conveyance made by the allottee. This of course would have involved the continuation of the tribe in legal effect during the restriction period, or until other disposition of the trust was provided, and it is probable that if such a disposition of the matter was considered it was not adopted because of the desire to sooner abolish tribal existence. It is to be remembered that the act of 1893, 27 Stat. 645, contemplated the extinguishment of the title, either by cession to the United States or by allotment to the individual Indians. Had the former been done, then allotment could have been effected similar to that under the act of 1887; but this was not done. The restrictions upon alienation were placed upon these lands for some purpose however. Let us see what it was. In *Beck vs. Flournoy Company*, 65 Fed. 34, Judge Sanborn says:

"The motive that actuated the lawmaker in depriving the Indians of power of alienation is so obvious, and the language of the statute in that behalf is so plain as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians."

Speaking of restricted allotments, under the general act, Judge Phillips says, in *Goodrum vs. Buffalo*, 162 Fed. 817,

"Accordingly, while authorizing the allotments in severalty, Congress conceded the lands with a firm cable attached to hold them to the exclusive use and possession of the Indians without qualification, restricting the power of divesting themselves of the use and title until after the fixed period."

There are numerous cases holding that the attempted conveyance of restricted allotted land is void, and that the purchaser, even though he has paid the purchase price, does not secure even an equitable title, nor can title be built up by adverse possession, estoppel, or any statute of Limitations. *Clark vs. Akers*, 16 Kansas, 166. *Shelton vs. Donohoe*, 40 Kansas, 346. *Schrimpacher vs. Stockton*, 183 U. S. 295. *Beck vs. Flournoy Company*, 65 Fed., 30. *Harris vs. Harbridge*, 166 Fed. 109. *Goodrum vs. Buffalo*, 162 Fed. 817.

In the Buffalo case last cited, Judge Phillips says:

"There is but one opinion among the courts, with the single exception of the ruling in said United States Court of Indian Territory, as to the construction of such acts of Congress and patents made thereunder; and that is, that any and all schemes and devices

99 resorted to for the purpose of acquiring title to the Indian allotments during the period of such limitation, are abortive. This for the palpable reason that it is a period of absolute disability on the part of the Indian to alienate his lands."

It follows that in any case wherein an allottee has been induced to dispose of any of his restricted land contrary to the laws under which it was set apart to him, he may, if the pretended purchaser has gone into possession, bring suit in ejectment and recover the same, and no rights accrue to the defendant in such cases by virtue of such transaction which he can interpose as a defense. If in such case the allottee is still in possession, he can successfully defend against a suit brought by such pretended purchaser to secure possession by virtue of such pretended conveyance. He can, in short, institute and maintain any action in relation to his restricted land, which any other citizen might prosecute in relation to real property and no deed, mortgage, lease, contract of sale, power of attorney, or other instrument of conveyance made by such allottee regarding his restricted land, contrary to the tribal agreements and acts of Congress relating thereto, can be legally urged as a defense to such action. As said by Judge Phillips, in the Buffalo case, *supra*:

"It should be understood, once and for all, that no scheme or device, however ingenious or plausible, concocted by any person, can avail to divest the Indians of the Title to their allotted lands within the period of limitation prescribed by Congress."

Having given the allottee the right of citizenship and clothed him with these unusual safeguards against his improvidence, has Congress in addition thereto, by the mere fact of placing restrictions upon the alienation of the land, intended thereby to reserve to the United States the right to sue in its own name to set aside such illegal transaction, and recover for the allottee such restricted property?

If such a right is reserved to the Government, and we are correct in the conclusion that the allottee is a citizen and may also maintain an action for the same purpose, then we have an anomalous condition under which, while the Government suit is pending in this court, the allottee, who is not a party here, if he sees fit, may go into the State court and sue the same defendant for the same relief. What rule of law is there binding the allottee by the suit in this court, to which he is not a party, even though it be professedly for his benefit? My attention is called to none, nor do I know of

100 any. Suppose a final decree is rendered in this court against the Government, with regard to any particular allotment, and suppose thereafter the allottee proceeds to bring suit in his own name against the same defendant or defendants, for identically the same cause of action and seeking identically the same relief, can these defendants plead as a defense in that suit the decree rendered here in a case to which the allottee was not a party? It is certainly extremely doubtful. In my judgment, the purpose of

Congress to establish such an extraordinary condition as this, must appear very plainly to warrant a court in arriving at such a conclusion. In the *United States vs. Payne Lumber Company*, 206, U. S., at page 473, it is said:

"The restraint upon alienation must not be exaggerated. It does not of itself divest the right below a fee."

It must be borne in mind that the cardinal purpose of Congress was the creation of a state, of which the Indians were to be citizens. Continued guardianship of the Indians was incompatible with citizenship, national and state. In my judgment when Congress clothed the allottee with full citizenship and to provide against his improvidence, vested in him title to his alienable land, so that no scheme nor device, however ingenious, could divest him thereof, it did so for the very reason that in carrying out the original plan of statehood, which was to include the Indian, his status as ward of the Government was not in the nature of things compatible with full citizenship in the state and union, and that it was not intended by Congress that the guardianship should longer continue.

(*United States vs. Auger*, 153 Fed. 671).

By this I do not mean to say that Congress may not make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if statehood had not ensued, for it reserved that right in the enabling act. But we are not now concerned with what Congress may do, but what it has done. I am not unmindful of the Act of March 3, 1905, and subsequent acts relative thereto. By the act of March 3, 1905, (33 Stat., Part 1, 1060) it is provided:

"It shall be the duty of the Secretary of the Interior to investigate, or cause to be investigated, any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, and he shall in any such case

101 where in his opinion the evidence warrants it, refer the matter to the Attorney General for suit in the proper United States Court to cancel the same, and in all cases where it may appear to the court that any lease was obtained by fraud or in violation of such agreements, judgment shall be rendered, cancelling the same upon such terms and conditions as equity may prescribe, and it shall be allowable where all parties [—] interest consent thereto to modify any lease and to continue the same as modified; Provided, no lease made by any administrator, executor, guardian, or curator which has been investigated by and has received the approval of the United States Court having jurisdiction of the proceeding shall be subject to suit or proceeding by the Secretary of the Interior or Attorney-General."

The act of March 1, 1909 (34 Stat., Part 1, 1026, contains this provision:

"To enable the Secretary of the Interior to investigate or cause to be investigated any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud or in

violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the Act approved March third, nineteen hundred and five, ten thousand dollars."

The act of April 30, 1909, (Indian Appropriation Act), also provides:

"To enable the Secretary of the Interior to investigate or cause to be investigated any lease, power of attorney, contract, deed, or agreement to sell any allotted land which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the Act approved March third, nineteen hundred and five, ten thousand dollars.

This act is a legislative declaration that in 1905, before it was passed, no duty devolved upon the Secretary to supervise the allottee in the leasing of his land, except where the law specially provided that such lease should be subject to his approval. In *Beck vs. Flourney Company*, supra, Judge Thayer said:

"It is manifest that the amendment in question, authorizing allotted land, to be leased in certain cases under the direction of the Secretary of the Interior, was unnecessary if power to execute leases of allotted lands had already been conferred by previous enactments or treaty stipulation. The last mentioned act, therefore, is a legislative declaration that Congress did not intend by any previous statute to authorize the leasing of any lands that might be
102 assigned to Indians to be held by them in severality."

But the Secretary of the Interior is charged with the supervision of all Indian Matters wherein the government still retains guardianship, and this duty would have existed without legislation, if at that time the government still retained the guardianship of the allottee with regard to the land covered by the lease referred to.

It is noted further that the matter is to be referred to the Attorney General for suit in the proper United States Court, and in the proviso they are referred to as suits or proceedings by the Secretary of the Interior or the Attorney General. Whatever may have been the status of the allottee in 1905, it is clear that in a suit now instituted under this provision to cancel or modify a lease, the allottee is a necessary party. First: Because he is one of the main parties in interest and for reasons heretofore adverted to, is necessary to a complete determination of the controversy, And, Second: Because as one of the parties in interest his consent to any modification of the lease as provided for is necessary.

While the appropriation of April 30, 1908 is made to cover investigation by the Secretary of powers of attorney, deeds, or agreements to sell any allotted land, in addition to the leases, provided for in the original act and other appropriation acts, the act refers in terms to the original act, which provides only for suits by the Attorney General regarding leases. There is nothing in this legislation which, in my judgment, authorizes the government to maintain the suits at bar independent of the allottee and without making him a party. It follows that in the present bill is a defect of parties.

It is urged that even though the complainant may have the

capacity to maintain these suits, the bills are subject to the objection of multifariousness, because numerous defendants are joined in each bill, for the reason that they are alleged to be connected with many distinct transactions regarding as many distinct tracts of land.

A bill is said to be multifarious when it improperly joins distinct and independent matters and thereby confounds them, as for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant. Or the demand of several matters of a distinct and independent nature against several defendants in the same bill. Words and Phrases, Vol. 5, P. 4615.

In *Barcus vs. Gates*, 89 Fed., 783, it is said:

103 "Multifariousness arises from the fact either that the transaction which form the subject matter of the suit are so separate and dissimilar that they cannot conveniently be tried in one record, or that one defendant is able to say that as to a large number of the transactions set out in one bill he has no interest or connection whatever. A bill is not multifarious because there are several causes of action, if they occurred out of the same transaction, and if all the defendants are interested in the same rights and the relief against each is of the same general character, the bill may be sustained."

In *Hale vs. Allison*, 188 U. S., 56, the suit of [of] a receiver against numerous stockholders to enforce their liability, the Court approves and adopts the opinion of District Judge McPherson, in the lower court. While that discusses the question of multiplicity of suits rather than multifariousness, the opinion is very pertinent to the situation here. In the course of the opinion, it is said:

"If, as is sure to happen, different defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. But even if the grounds of diminished trouble and expense may seem to be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the Court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many counsel will no doubt be concerned, whose conveniences must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of witnesses will not in any degree be dismissed, and if some docket costs may be escaped, that is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill [ever] separate action at law."

Suppose the court were to retain jurisdiction of these bills and require that the allottees all be made parties, either as plaintiffs or defendants. The bill would then essentially involve a multitude of separate suits, each by an allottee, the main party in interest, as plaintiff, and one or more but not all of the defendants, as defendants.

I appreciate fully the motive of the pleaders who conceived that the government was the only necessary plaintiff, so that each bill would be merely the suit of one plaintiff against various defendants, and, conceiving that each bill involved practically but one question of law, in the determination of which all of the defendants

were equally interested, deemed it most practiced to institute one suit instead of many.

104 But to my mind these bills, viewed from any standpoint consistent with the facts and conditions involved, each essentially combine a multitude of separate and distinct plaintiffs against separate and distinct defendants, and are subject to the objection of multifariousness.

There are other grounds of objection raised by the demurrer not necessary now to consider. For the reasons set forth in this opinion, the demurrers, in my judgment should be sustained, and the bills dismissed.

It is so ordered.

(Signed)

RALPH E. CAMPBELL, *Judge*.

Muskogee, Oklahoma, August 6, 1909.

Endorsed as follows: In the United States Circuit Court for the Eastern District of Oklahoma. The United States of America, Complainant, vs. James P. Allen, et al., Defendants. No. 284 and Similar Cases. Opinion Sustaining Demurrers. Filed Aug. 6, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

105 And thereafter on the 13th day of September, 1909, at McAlester, it being a day of the regular McAlester term, present and presiding Honorable Ralph E. Campbell, Judge, after court being opened in due form, the following, among other proceedings, were had:

106 & 107 (f) *Motion to Make Order and Decree Applicable in Fourteen Cases Only.*

In the Circuit Court of the United States of America within and for the Eastern District of Oklahoma.

In Equity. Nos. 284 to 438, Both Inclusive.

THE UNITED STATES, Complainant,

vs.

* * * * *

108

Motion.

Comes now the United States of America, the complainant in the bills in equity numbered 284 to 438, both inclusive, by its solicitors, and says that the record in all of said cases, including copies of bill, copies of demurrer filed in all of said cases, copies of orders and proceedings had therein, necessary to be made and authenticated under the rules upon allowance and perfecting the appeal to be asked for from the decree and order to be entered, sustaining the demurrers and dismissing said bills, pursuant to the opinion of this Court, rendered on the sixth day of August, 1909, if entered in all of said cases will be of great bulk and voluminousness.

That in a large part of this record, if so made, there will be many duplicates in the copies of bills, the demurrers, orders and proceedings, resulting in unnecessary and useless encumbering of the dockets and records in the Clerk's Office in the Appellate Court.

That it is possible to select from said bills numbered as above, fourteen certain bills, in which can be raised all questions necessary to the determination of all the issues contained in all of said bills, numbered 284 and 438, both inclusive.

That the following bills are presented by the complainant as involving all questions necessary to raise complete issues for all of the bills. The classification, the tribe, the number of the bill and the name of the principal defendant are shown.

* * * * *

109 Now, therefore, in order to reduce to a minimum the volume of the record to be authenticated on appeal, by eliminating unnecessary duplication, to prevent useless confusion and crowding of the dockets in the Appellate Court, and to minimize the work of preparing the record for authentication by the Clerk of this Court, said complainant moves that an order be entered in all bills other than the fourteen above stated that they be and remain in statu quo without the entry of the order sustaining the demurrers and dismissing the bill, pending the appeal to be asked for in said selected cases above enumerated, except that special dismissals may be asked for by the complainant as heretofore, and that the orders sustaining the demurrers and dismissing the bills, to be made and entered in pursuance of said opinion, be made and entered in said selected cases above set forth only, and as to which when so entered the complainant intends to ask for the allowance of an appeal and the authentication of such of the record and the filing of the assignments of error such as will raise all questions, above suggested.

The complainant in making this motion also wishes to record its desire and intention to obtain, if possible, the advancement and early hearing of the causes in the Appellate Court and its willingness that all counsel not having appearances entered in the special bills, but having heretofore appeared in the bills not so selected, may appear, argue and file briefs, and do all things which could be done as though their appearances had been filed therein, and further, the complainant desires to express its willingness that the decision of the Appellate Court may be made applicable to each of the cases as though they had been each one taken up on appeal and the decision of the Appellate Court rendered therein.

THE UNITED STATES,

By GEO. W. WICKERSHAM,

Attorney General,

By A. N. FROST,

Special Assistant to Attorney General.

111 Endorsed as follows: Nos. 284 to 438, both inclusive. Motion. Filed in open court Sept. 13, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

112 Thereupon the Court overruled the complainant's motion and ordered that the entry of the decree and order sustaining the demurrers and dismissing the bills be made in bills numbered 284 to 438, both inclusive. Said order is as follows:

113 In the United States Circuit Court for the Eastern District of the State of Oklahoma.

In Equity. Nos. 284 to 438, Both Inclusive.

THE UNITED STATES OF AMERICA, Complainant,

vs.

JAMES P. ALLEN et al., Defendants.

Motion Overruled.

On this the 13th day of September, 1909, coming on to be heard the complainant's motion that fourteen certain cases be selected for the entry of the decree and order sustaining the demurrers and dismissing the bills, and that all of the remainder of said bills be allowed to remain in statu quo pending an appeal to be taken in said fourteen cases, enumerated in said motion, upon consideration of the foregoing motion, after argument of counsel for complainant and counsel for defendants, the Court being fully advised, it is ordered that said motion be overruled, and that the order sustaining the demurrers and dismissing the bills be entered in cases 284 to 438, both inclusive.

RALPH E. CAMPBELL, Judge.

114 Endorsed as follows: Nos. 284 to 438, both inclusive. Order overruling motion. Filed in open court, Sept. 13, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

The following decree and order was then entered in said cause:

115 In the United States Circuit Court for the Eastern District of Oklahoma.

In Equity. No. 359.

THE UNITED STATES OF AMERICA, Complainant,

vs.

ALFRED F. GOAT et al., Respondents.

Decree.

On this thirteenth day of September, 1909, on consideration of the demurrers to the bill filed by the various defendants herein, which were heretofore argued and submitted and by the Court taken under advisement, the Court now finds that the Complainant has not such an interest in the matters involved in this cause as entitles it

to maintain this action, that the various allottees and patentees of the lands involved in this action are necessary parties thereto, and that there is, therefore, a defect of parties; and that the bill is multifarious.

It is the judgment of the Court that for the foregoing reasons the demurrers should be sustained.

It is therefore ordered that the demurrers herein, now being considered be sustained and the bill dismissed at the complainant's costs.

RALPH E. CAMPBELL, *Judge*

116 Endorsed as follows: No. 359. The United States vs. Alfred F. Goat et al. Decree and Order. Filed in Open Court, September 13, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

117 *Prayer for Appeal.*

Thereupon the complainant prayed an appeal in open Court, and that the Clerk be ordered to prepare and authenticate a transcript of the record, which said prayer for appeal and order are in words and figures as follows:

118 In the United States Circuit Court for the Eastern District of Oklahoma.

In Equity. No. 359.

THE UNITED STATES OF AMERICA, Complainant,
vs.

ALFRED F. GOAT et al., Respondents.

Petition for Allowance of Appeal.

To the Honorable Ralph E. Campbell, Judge of said Court:

Comes now the above named complainant, by its solicitors, and considering itself aggrieved by the decree and order made and entered in this cause on the thirteenth day of September, 1909, does hereby appeal from said decree and order to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of error, which is filed herewith, and prays that its appeal be allowed, and that a transcript of the record proceedings and papers upon which said decree was based, duly authenticated and consisting of:

First. The Bill of Complaint, except such transactions in paragraph six thereof, as to which special orders of dismissal have been heretofore entered on petition of complainant.

Second. One copy of the different demurrers filed herein;

Third. Final Decree and Order;

Fourth. All endorsements of findings of documents above specified;

Fifth. Copy of Appeal; and Assignment of Error;

Sixth. Copy of Order allowing the same;

Eighth. The Opinion of the Court;

may be prepared by the Clerk, and transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

THE UNITED STATES OF AMERICA,
By GEORGE W. WICKERSHAM,

Attorney-General,

By A. N. FROST,

Special Assistant to Attorney-General.

119

(j.)

Allowance of Appeal.

Thereupon the Court allowed said appeal, and ordered the Clerk to prepare and authenticate a transcript of the record, as prayed for.

Said allowance and order are in words and figures as follows:

The foregoing petition is granted, and the appeal allowed, and the Clerk is instructed to make and authenticate the record, as above set forth.

Done this Sept. 13th, 1909.

RALPH E. CAMPBELL, *Judge.*

120

Endorsed as follows: No. 359. The United States vs. Alfred F. Goat, et al. Petition for appeal and order. Filed in open Court, September 13, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

121

(k.)

Assignment of Error.

Thereupon the complainant filed assignment of error, which said assignment of error is in words and figures as follows:

122 In the United States Circuit Court for the Eastern District of Oklahoma.

In Equity. No. 359.

THE UNITED STATES OF AMERICA, Complainant,
vs.

ALFRED F. GOAT et al., Defendants.

Assignment of Error.

Comes now the complainant in the above entitled cause, by its Solicitors, and files the following assignment of error upon which it will rely for grounds of reversal in its appeal from the order and de-

erree made by this honorable court on the thirteenth day of September, 1909, in the above entitled cause:

That the Court erred:

1.

In sustaining the demurrers filed herein, and ordering said cause dismissed.

2.

In holding that said cause could not be maintained in the names of the United States as sole complainant, for the reason that Congress has not so authorized, and for other reasons.

3.

In holding that the members of the Five Civilized Tribes are citizens of the United States.

4.

In holding that the allottee's personal status as a citizen, and relation to the United States, is such that this suit cannot be
123 maintained solely in the name of the United States, and that the guardianship of the United States is incompatible with such citizenship.

5.

In holding that the guaranty of the United States and its guardianship extends only to the Five Civilized Tribes, and not to the individual members thereof.

6.

In holding that a termination of the relationship of guardian is shown by the legislative enactments with reference to the disposition of the affairs and property of the Five Civilized Tribes and its members, together with the alleged granting of citizenship.

7.

In holding that the restrictions placed on the alienation of the lands allotted to members of the Five Civilized Tribes did not reserve to the United States the right to sue in its own name to set aside any transactions made in contravention of such laws against alienation, and to recover for the allottee his property so attempted to be alienated.

8.

In holding that there exists no duty, policy or power in the United States upon which can be predicated the right of the United States to maintain this cause in its own name.

9.

In holding that the allotment of the lands of the Five Civilized Tribes to its members, subject to certain restrictions, and the citizenship alleged to have been created, fulfilled any duty which may have existed in the United States to any of the citizens of the Five Civilized Tribes.

10.

In holding that the allottees are necessary parties to this cause.

124

11.

In holding that there is a defect of parties in said bill.

12.

In holding that said bill is multifarious.

13.

In holding that there is a misjoinder of causes of action in this bill.

14.

In holding that there is a misjoinder of parties in this bill.

15.

In failing to hold that the Acts of Congress removing restrictions from the land of certain of the allottees of the Five Civilized Tribes did not affect the duty owed by the United States to secure the cancellation of any instruments attempting to convey the inalienable allotments of said allottees, and to restore to the said allottees the land so attempted to be conveyed while restricted, nor its right to bring an action in its own name as sole complainant for said purpose.

* * * * *

125

16.

In failing to hold that the transactions set forth in paragraph six of the bill of complaint, being attempted conveyances by freedman citizens of the Seminole Tribe of Indians of their allotments, were illegal for the reason that said allotments, at the dates of the instruments complained of, were, and now are, inalienable, a right of occupancy only having been given to the allottees of the Seminole Nation of the lands allotted to them in severalty, and no patents having been issued to said allottees, as set forth in paragraph four of the bill of complaint.

126

17.

In failing to order that said attempted conveyances, so complained of, be cancelled, and possession of the lands therein be given to the allottees thereof, and that the title of said allottees be quieted, and decreeing accordingly.

18.

In failing to rule that said demurrers should be overruled.

19.

In failing to decree that the United States, on the allegations of the bill, is properly the sole complainant, and entitled to the discovery and relief prayed for.

Wherefore: For these, and divers other errors appearing upon the record, the appellant prays that the decree and order herein be reversed, and that the United States Circuit Court of Appeals for the Eighth Circuit render such proper decrees and orders on the record as justice and equity demand.

THE UNITED STATES OF AMERICA,
By GEO. W. WICKERSHAM,

Attorney General,

By A. N. FROST,
Special Assistant to Attorney-General.

127 Endorsed as follows: No. 359. The United States vs. Alfred F. Goat, et al. Assignment of Error. Filed in open Court Sep. 13, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

128

(L.)

Authentication.

I, L. G. Disney, Clerk of the United States Circuit Court for the Eastern District of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct transcript of so much of said cause as the same appears on file and of record in my office at Muskogee as was ordered to be prepared and authenticated.

In testimony whereof, Witness my hand and official seal, this the 16th day of September, A. D., 1909.

[SEAL.]

L. G. DISNEY, *Clerk,*
By OTIS LORTON,
Deputy Clerk.

Filed Sep. 17, 1909. John D. Jordan, Clerk.

129 (*Appearance of the Attorney General and Others for Appellant.*)

On the twenty-seventh day of September, A. D. 1909, the appearance of The Attorney General and others for appellant, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3163.

THE UNITED STATES OF AMERICA, Appellant,

vs.

ALFRED F. GOAT et al.

The Clerk will enter my appearance as Counsel for the Appellant.

GEO. W. WICKERSHAM,

U. S. Att'y Gen'l;

CHARLES W. RUSSELL,

Ass't Att'y Gen'l;

A. N. FROST,

Sp'cl Ass't to Att'y Gen'l.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3163. The United States of America, Appellant, vs. Alfred F. Goat, et al. Appearance. Filed Sep. 27, 1909, John D. Jordan, Clerk. George W. Wickersham, Charles W. Russell, A. N. Frost, Counsel for Appellant.

(*Appearance of Mr. Harlow A. Leekley and Others for Appellant.*)

And on the ninth day of October, A. D. 1909, the appearance of Mr. Harlow A. Leekley and others, as counsel for appellant, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3163.

THE UNITED STATES OF AMERICA, Appellant,

vs.

ALFRED F. GOAT et al.

The Clerk will enter my appearance as Counsel for the Appellant, in addition to those heretofore entered.

130

HARLOW A. LEEKLEY,

JAMES E. GRESHAM,

E. C. MOTTER,

Special Assistants to the Attorney-General.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3163. The United States of America, Appellant, vs. Alfred F. Goat,

et al. Appearance. Filed Oct. 9, 1909, John D. Jordan, Clerk. Harlow A. Leekley, James E. Grasham, E. C. Motter, Counsel for Appellant.

(Appearance of Mr. B. B. Blakeney for Appellees.)

And on the ninth day of November, A. D. 1909, the appearance of Mr. B. B. Blakeney, as counsel for appellees, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3163.

THE UNITED STATES OF AMERICA, Appellant,

vs.

ALFRED F. GOAT et al.

The Clerk will enter my appearance as Counsel for the Appellees.
B. B. BLAKENEY,
Shawnee, Okla.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3163. The United States of America, Appellant, vs. Alfred F. Goat, et al. Appearance. Filed Nov. 9, 1909, John D. Jordan, Clerk. B. B. Blakeney, Counsel for Appellees.

* * * * *

131-140 *(Appearance of Messrs. Hutchings & German for Appellees.)*

And on the eleventh day of November, A. D. 1909, the appearance of Messrs. Hutchings & German, as counsel for appellees, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3163.

THE UNITED STATES OF AMERICA, Appellant,

vs.

ALFRED F. GOAT et al.

The Clerk will enter my appearance as Counsel for the Appellees.
WILLIAM T. HUTCHINGS.
WILLIAM P. Z. GERMAN.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3163. The United States of America, Appellant, vs. Alfred F. Goat, et al. Appearance. Filed Nov. 11, 1909, John D. Jordan, Clerk.

William T. Hutchings, William P. Z. German, Counsel for Appellees.

* * * * *

141

(Order of Submission.)

And on the seventh day of December, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

142 United States Circuit Court of Appeals, Eighth Circuit,
December Term, 1909.

TUESDAY, *December 7, 1909.*

* * * * *

No. 3163.

THE UNITED STATES OF AMERICA, Appellant,
vs.
ALFRED F. GOAT et al.

* * * * *

Appeals from the Circuit Court of the United States for the Eastern District of Oklahoma.

These causes having been called this day for further hearing, argument was continued by Mr. S. T. Bledsoe, Mr. George S. Ramsey, Mr. B. B. Blakeney, Mr. James E. Humphrey, Mr. Joseph C. Stone and Mr. Robert L. Owen and concluded by Mr. Assistant Attorney General Russell.

Thereupon each of the above named causes was submitted to the Court on the transcript of record as printed for the use of the Court in each of said cases and upon the briefs filed by counsel for various parties herein.

(Opinion.)

And on the eighth day of June, A. D. 1910, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

143 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1910.

- No. 3150.—United States, Appellant, vs. James P. Allen, et al.
 No. 3151.—United States, Appellant, vs. N. E. Patterson, et al.
 No. 3152.—United States, Appellant, vs. Charles E. McPherran, et al.
 No. 3153.—United States, Appellant, vs. F. B. Severs, et al.
 No. 3154.—United States, Appellant, vs. Wilson Bruton, et al.
 No. 3155.—United States, Appellant, vs. Norman Pruitt, et al.
 No. 3156.—United States, Appellant, vs. James Jefferson, et al.
 No. 3157.—United States, Appellant, vs. J. J. Creamer, et al.
 No. 3158.—United States, Appellant, vs. Filix R. Phillips, et al.
 No. 3159.—United States, Appellant, vs. J. M. Dickenson, et al.
 No. 3160.—United States, Appellant, vs. James P. Allen, et al.
 No. 3161.—United States, Appellant, vs. Walter F. Nichols, et al.
 No. 3162.—United States, Appellant, vs. John F. McClellan, et al.
 No. 3163.—United States, Appellant, vs. Alfred F. Goat, et al.
 No. 3265.—United States, Appellant, vs. George C. Crump, et al.
 No. 3276.—United States, Appellant, vs. C. J. Benson, et al.
 No. 3279.—United States, Appellant, vs. J. O. Davis, et al.

Appeals from the Circuit Court of the United States for the Eastern District of Oklahoma.

Mr. Charles W. Russell, Assistant Attorney General, for Appellant.
 Mr. S. T. Bledsoe, Mr. George S. Ramsey, Mr. B. B. Blakeney, Mr. James E. Humphrey, Mr. Joseph C. Stone and Mr. Robert L. Owen, pro se, (Mr. A. W. Clapp, Mr. O. L. Rider, Mr. Kenneth S. Muchison, Mr. Wm. M. Matthews, Mr. C. L. Thomas, Mr. N. A. Gibson, Mr. Robert J. Boone, Mr. George C. Butte, Mr. Garfield Johnson, Mr. T. S. Cobb, Messrs. Crump, Rogers & Harris, Messrs. Willmott & Wilhoit, Mr. W. L. McCann, Mr. Thomas H. Owen, Mr. W. B. Crossan, and Messrs. Davis & Davis were with them on the briefs) for Appellees.

144 Before Hook and Adams, Circuit Judges, and Amidon, District Judge.

AMIDON, *District Judge*, delivered the opinion of the Court.

The lands of the five civilized tribes were allotted in severalty to their members, subject to express restrictions against their alienation for specified periods of time. The bills in these suits charge that many thousand conveyances have been made in violation of those restrictions, and the suits have been brought by the United States to have some four thousand of these conveyances declared to be void and cancelled of record. The restrictions against alienation arise out of numerous statutes and treaties, and vary according to such matters as the amount of Indian blood of the allottee, whether the land was a homestead, and whether it was held as an original

allotment or by inheritance. The grantees under the conveyances are classified according to some distinct feature of the restriction upon alienation, and all grantees coming under each class are combined as defendants in a single suit. The allottees are not made parties either as plaintiff or defendant, and it is not charged in the bills that the conveyances were obtained by fraud, misrepresentation, or for an inadequate consideration. They are assailed solely upon the ground that they were made in violation of the restriction which congress imposed upon the alienation of the allotments.

These bills were demurred to upon numerous grounds. The demurrers were sustained by the trial court for the reason (1) that the complainant has not such an interest in the matters involved as entitles it to maintain the action; (2) that the allottees are necessary parties, and that there is therefore a defect of parties; (3) that the bills are multifarious. A decree was entered in each case dismissing the bill upon the merits, to review which is the object of this appeal.

The consideration of the case will be simplified if it is understood at the outset that the plan of the government in dissolving the five civilized nations and distributing their lands in severalty, was not simply a real estate transaction. It was a great governmental project, having for its object the social and industrial elevation of the Indians. For the accomplishment of that result there were two main reliances: (1) the added incentive which comes from the individual ownership of property as distinguished from its joint or tribal ownership; (2) the continuance of that ownership for such a period as should bring the Indian into a state where he could safely be trusted to protect his interests in the sharp competition with members of the white race. During all the years that this scheme was in process of execution, the Indian lands, like the Indians themselves, were subject to the supreme authority of the national government. The United States proceeded, in so far
145 as it could, with the consent of the Indians. That, however, it did as a matter of wise governmental policy, and not in obedience to any constitutional restriction. Whenever it encountered the obstinate opposition of the Indians to its plans, it did not hesitate to set aside their will and substitute its own authority. The title to these lands was in the Indian tribes, and the formal conveyances to the individual members were made by tribal officers. All this, however, was done in obedience to the regulations of the national government. To attempt to cramp these large governmental measures to the narrow limits of a real estate transaction is to deprive them of their distinctive character. And yet much of the argument contained in the briefs, as well as the opinion of the trial court, treats these measures as a matter between grantor and grantee, and wherever they do not fit the private law of real property, they are declared to be ineffective.

The same observations may be made as to the statement of the relation between the national government and the Indians being that of guardian and ward. These are familiar terms in decisions dealing with Indian matters. They are, however, words of illustra-

tion, and not of definition, and to attempt to reason from the private law of guardian and ward to the measures of the federal government in dealing with the five civilized tribes, leads only to confusion and the subversion of the real scheme of government.

Turning now to the objections which were made and sustained by the trial court, has the federal government such an interest as entitles it to maintain these suits? It will be conceded at the outset that it has no legal or equitable estate in the allotments; and if such an estate is necessary, it has no standing in court. It is, however, too plain for controversy, that the federal government imposed restrictions upon the alienation of these allotments. That restriction was its main reliance for the social and industrial elevation of the Indians. Has it a standing in Court for the enforcement of its policy? To say that it has not is to make the restraints upon alienation a mere brutum fulmen. Shall the Indians who are intended to be restrained, be made the sole agency for the enforcement of the restraint? If so, the act of congress is nothing more than a benevolent admonition. If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation a pauperized, discontented and, possibly, belligerent people. To prevent such results the United States may invoke the aid of its courts. That question was put to rest in the decision of *In Re Debbs*, 158 U. S., 564. When a suit in equity is an appropriate method for the enforcement of a governmental policy,

the national government may maintain such a suit. The present case presents a right of the nation which has been violated and cannot be redressed in any other way than by a suit in equity. If its interest in its measures does not give it a standing in court, then the violation of those measures must go wholly without redress. Governmental action cannot be thus paralyzed. If the aid of the court is an appropriate remedy, the government has the same right to proceed in that manner that it has to use executive power where that power is an appropriate agency for the accomplishment of its purposes.

The Supreme Court of the United States in the case which carried the emancipation of the Indians and their property to the fullest extent, expressly recognizes the right of the government to enforce, by appropriate action in court, the restraints which it imposed upon the alienation of Indian allotments. The court says in the *Heff* case, 197 U. S., 489, 509: "Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a national or

state court. * * * Many a tract of land is conveyed with conditions subsequent. A minor may not alienate his lands; and the proper tribunal may at the instance of the rightful party enforce all restraints upon alienation."

Under the general allotment act of 1887, a provisional patent was issued to the allottee, and the naked legal title retained in the government for the period of twenty-five years. In the case of the five civilized tribes, this plan was modified to the extent of granting the legal title to the Indian, but imposing upon it a restraint against alienation. These plans present simply differences of method. The object sought in each case was the same, namely, to clothe the Indian with such title to the property as seemed best calculated to encourage his industrial development, and yet accompany this grant with such a restriction as would prevent the main reliance of the government for the industrial betterment of the Indian from being defeated by the alienation of the property. The right of the government to invoke the aid of its court to prevent the defeat of its object is the same under the one statute as the other. Its right to maintain a suit to prevent the defeat of its allotment scheme under the general law of 1887, is fully sustained in *United States v. Rickert*, 188 U. S., 432. It is contended, however, in the present case, that that decision is not controlling because there the government held the legal title to the property for a period of 25 years in trust for the Indian, but subject to a restraint upon alienation, whereas here the legal title has been conveyed to the Indian. The decision in the *Rickert* case does not rest upon a principle of the law of real property but upon the power of the nation to enforce its own measures. At page 444 of the opinion the right of the government to maintain the suit is declared to rest, not upon the fact that it held the title to the property, but, to use the language of the court,

147 upon "the injurious effect of the assessment and taxation complained of upon the plans of the government with reference to the Indians." In either case it is not a right of property which is enforced, but a plan of government. The Supreme Court there declares the right of the nation to maintain a suit for the enforcement of its policy in regard to Indian allotments to be too plain for argument. 188 U. S., 444. This statement is approved in *McKay v. Kalyton*, 204 U. S., 458, 467.

But we are not left to inference from the general scheme of the national government in its dealings with the five civilized tribes, to find authority for the maintenance of these suits. They are authorized by express act of congress. The last paragraph of Section 6 of the Act of May 27, 1908 (35 Stat. at Large, 312), is a saving clause. Viewed solely in that light it declares the belief and intent of congress that the rights which it saves, exist. It does not, however, stop with the language which saves the rights specified, but proceeds to declare the conditions upon which those rights shall be exercised by stating that the suits shall be brought upon the recommendation of the secretary of the interior, and without cost to the allottees. It thus passes beyond the scope of a saving clause, and uses language which is consistent only with the grant of the

power to institute the suits. When this language is read in connection with the earlier part of the section appropriating \$50,000 to cover the expenses incurred by the attorney general in this litigation, the intent of congress that the power to maintain the suits is granted, and its purpose that such suits should be instituted in proper cases, is clearly manifest. It is incredible that the purpose of congress was simply to provide for the institution of suits to obtain a judicial determination as to whether the power of the government to maintain such suits existed. Congress, by its own declaration, could have placed that question beyond controversy, and the courts ought not to give a meaning to its acts which would make of them a mere squandering of public funds. That which is implied is as much a part of a statute as that which is expressed. *City of Little Rock v. U. S.*, 103 Fed., 418; *United States v. Babbitt*, 1 Black, 55. Implications far less clear than the power to maintain these suits, have been enforced by the courts. *Gelpeke v. City of Dubuque*, 1 Wall., 220; *Postmaster General v. Early*, 12 Wheaton, 135, 146; *Telegraph Company v. Eyser*, 19 Wall., 419; *Great Northern Railway Co. v. United States*, 155 Fed., 945. The trial court held that, because a statute conferring the jurisdiction here in question by more direct language, was not enacted, though brought to the attention of the committee having the present act in charge, that this amounted to an expression of the legislative intent that the right itself either did not exist or was so doubtful that the only proper procedure was to make provision for a judicial determination of its existence. Courts can find the intent of the legislature only in the acts which are in fact passed, and not in those which are never voted upon in congress, but which are simply proposed in committee. It is not contended that the bill referred to was ever brought to a vote in congress and rejected. It was simply one of 118 the measures which was under consideration at the time the act of May 27, 1908, was passed. To hold that such facts can be looked to for the purpose of narrowing the effect of a statute actually passed, would be to invent a new and dangerous canon of statutory interpretation.

Much of the briefs is devoted to arguments deduced solely from the fact that congress has conferred national citizenship upon the Indians. These arguments have been frequently presented to the courts, but so far as we are aware, they have never defeated the exercise of national authority over the Indian except in the *Heff* case, 197 U. S., 488. That decision, however, as now explained by the Supreme Court in *United States v. Celestine*, 215 U. S., 278, lends no support to the defendants. The case arose under the general allotment act of 1887. That statute provides that, upon the completion of the allotments, the Indians "shall have the benefit of, and be subject to the laws, both civil and criminal, of the State." Mr. Justice Brewer carries this feature of the statute through his opinion at every step as the basis of the decision of the court. He has now removed all possible doubt on the subject by his opinion in the *Celestine* case, where he expressly states that the *Heff* opinion rests upon the fact that under the general allotment act congress has,

by direct provision, entirely renounced its own authority over the Indians, and subjected them to the laws of the state, both civil and criminal. The decision of the *Heff* case simply gives effect to this positive declaration of the legislative intent. In its dealings with the five civilized nations, congress has been at great pains to indicate a different purpose. Here it has from time to time down to the organic act admitting Oklahoma, and the provisions which it insisted should be embodied in the constitution of that state, reserved to itself express authority to pass such laws with respect both to the Indians and their lands, as shall in its judgment seem wise. In the present case, though it conferred citizenship upon the Indians, it accompanied its grant of the allotments to them with an express provision against their alienation. The difference between the present case and the *Heff* case is this. In the former case congress expressly renounced its own authority over the Indians, and subjected them to the laws, both civil and criminal, of the state. Here congress, with equal explicitness, has imposed a restraint upon the alienation of allotments. It is as much the duty of the courts to give effect to the legislative intent in the present case as in the former. See also *U. S. v. Sutton*, 215 U. S., 291.

The grant of citizenship to the members of the Five Nations, was intended for their protection, and not to strip them of the protection of the national government. It was, in our judgment, never the intent of congress to deprive itself of the authority which it had always exercised to adopt such measures as in its judgment were wise for the protection of the Indian in his rights among the more highly developed members of the white race. Conceding the Indians
149 to be citizens of the United States and of the state of their residence, this court still said in the case of *United States v. Thurston County*, 143 Fed., 287, 288: "Their civil and political status, however, does not condition the power, authority or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. They are still members of their tribes and of an inferior and dependent race." Clothing them with citizenship did not change their character or invest them with full industrial capacity. These records are eloquent on that subject. An intent to destroy the authority of the national government to protect the Indian, ought not to be deduced as a mere speculative inference from the definition of citizenship. Such a radical change of national policy should emanate only from express and unequivocal language.

Section 1 of the act of May 27, 1908, removes all restraints upon alienation as to several classes of allotments. Section 6 of that act provides for the appointment of representatives of the secretary of the interior to counsel and advise Indian allottees having restricted lands, with reference to the same, and also authorizes these agents to bring suits in the name of the allottee to cancel and annul any conveyance or encumbrance thereof made in violation of any act of congress. These provisions standing alone, would afford a strong

implication against the right of the government to maintain these suits in its own name as to lands that are freed from restriction by section 1. The Indian as a citizen of the United States has a clear right to maintain any suit necessary to set aside illegal conveyances of his property. By Section 1 of the act he is vested in certain cases with an unrestricted right to dispose of his allotment. How can the Attorney General contend that as to lands thus freed from restriction by the government he is truthfully representing its present policy by prosecuting these suits in its name? Again, it might well be urged that, inasmuch as congress has authorized the agents of the secretary of the interior to maintain suits in the name of allottees to cancel any instrument executed in violation of law, it has thereby indicated its intent that no other governmental agency should institute such suits. These contentions, in our judgment, would be controlling were it not for the last paragraph of Section 6 of the act. It reads as follows:

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit, and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof."

150 "Nothing in this act" includes the provision from which the implication is drawn against the right of the government to maintain these suits. The later language of the paragraph extends that right to all conveyances which "have been made contrary to law with respect to said lands prior to the removal therefrom of restrictions upon the alienation thereof." According to the averments of the bills, every conveyance here involved falls clearly within these words. To deny the right of the government to maintain these suits is to repudiate the plain language and manifest object of the paragraph which we have quoted. The Indians and their lands were subject to the supervision of the secretary of the interior, and the act provides that the suits shall only be brought on his recommendation. The power of congress to confer such an authority is beyond question. Whether the suits should be brought presents a question of administrative rather than judicial discretion. If congress saw fit to reinvest allottees with a clear title to their allotments before freeing them from restraint by section 1 of the act, that is clearly a subject with whose wisdom the courts cannot interfere. It is our duty to give effect to the intent of congress as declared by the statute. The Supreme Court in the case of *United States v. Celestine*, 215 U. S., 278, again enforces the duty of the courts so as to construe legislation of congress in relation to the Indians so as to promote their interest. Applying that canon, we entertain no doubt of the right of the government to maintain these suits. They are brought in the name of the United States to enforce a right created by federal law. The jurisdiction of the Circuit Court is therefore plain.

Is there a defect of parties? The rule as to parties in equity was early stated by Mr. Justice Curtis in language so accurate and comprehensive that it has since been accepted by all federal courts. He says that parties are: "1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, 17 How., 129, 139.

The Supreme Court in *Waterman v. Canal Louisiana Bank Co.*, 215 U. S., 33, 49, after quoting the above language with approval, condenses the rule as to indispensable parties as follows: "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between 151 the parties actually before the court, without injuriously affecting the rights of such absent party." That is the real ground of the decision of the Supreme Court in *Minnesota v. Northern Securities Company*, 184 U. S., 199. The decree there could not be enforced against the Northern Securities Company without destroying the rights of the Northern Pacific and Great Northern Railroad Companies, and their stockholders, who were not parties. See also *Rogers v. Penobscott Mining Co.*, 154 Fed., 615. The allottees in the present case do not come within the class of indispensable parties as thus defined. The cause of action set up in the bill is not theirs but the government's. True, if the government succeeds their titles will be cleared of clouds; but if it does not succeed, they will be left with their personal causes of action unaffected by what is done in the present litigation. It may be said that this very fact makes the presence of the allottees necessary to complete justice to the defendants. While the measure of justice in their favor would be more complete if the allottees were present, that fact does not render the allottees indispensable parties. It is not the mere convenience of the parties before the court which renders absent parties indispensable, but the protection of the rights of those absent parties. Looking at the entire litigation, justice to the defendants will also be promoted by this practice. The Indians have already parted with their lands by deed. While they have the legal right to assail the conveyances if they were made in violation of the statute against alienation, the exercise of that right by the Indians after a decision against the government in the present suit, is so problematical that it would be oppressive to compel the plaintiff to bring all allottees before the court, and would also add unneces-

sarily to the costs of the defendants in case the suits shall go against them. Again, the allottees, if present, would have no control over the suits. Their consent to a judgment in favor of the defendants would not defeat the right of the government. In our judgment, therefore, there is no defect of parties.

The defense of multifariousness is without merit. That defense, as the Supreme Court has frequently declared, is "very largely a matter of convenience." *United States v. Bell Telephone Co.*, 128 U. S., 315, 352; *Graves v. Ashburton*, 215 U. S., 331, 335. It is addressed to the sound discretion of the court. The convenience both of the defendants and the government is conserved by joining in one action all such conveyances as the government claims are invalid because made in violation of a specific statute.

Only one question remains for consideration. The statutes imposing restraints upon alienation were changed from time to time between the year 1893, when the allotment of the lands in severalty began, and the time of their completion some fifteen years later. It is earnestly contended by the defendants that after allotments had been made subject to a specific limitation, the government was without power to enlarge the period of that limitation; that the Indian obtained a vested right in his allotment, subject only to the restriction which was imposed upon it at the time the allotment was made, and that to enlarge the period of the restriction would be an impairment of his vested rights, in violation of the 14th Amendment to the Constitution. So long as the lands were held by the Indian allottee, or by an Indian who claimed under him by inheritance, we do not think this contention is sound. The grant of citizenship to the Indian did not destroy the right of the federal government to regulate and restrict his use of these lands. Though a citizen of the United States, he did not cease to be an Indian, and both he and his property remained subject to the national government. Congress has from time to time asserted this authority, and to hold that its enactments in that regard are unconstitutional, would be disastrous to the Indian, and would probably still further confuse the already complicated title to lands in Oklahoma. The extension of the period of restriction under the general allotment act is referred to with approval in *U. S. v. Celestine*, 215 U. S. 291. It is, of course, true that conveyances of allotments to third parties in accordance with the law in force at the time the conveyances were made, could not be impaired by subsequent legislation on the part of congress enlarging the period of restriction against alienation.

The whole scheme of allotment of lands in severalty to the Indians is an experiment. Congress, in the case of the Five Nations, has attempted to reserve to itself power to deal with the subject in the light of experience. If the plan proves a failure, after a fair trial it would be disastrous, indeed, if the mere grant of citizenship to the Indians had placed him beyond the power of the federal government to adopt such measures for his welfare as experience should show to be necessary.

The decrees are reversed, and the trial court is directed to proceed with the suits in accordance with the views here expressed.

Filed June 8, 1910.

ADAMS, *Circuit Judge*, dissenting:

I am unable to agree with my associates that the United States can of its own motion without the request or consent of the Indians whose rights are involved maintain these suits to remove a cloud from their title. When the suits were instituted the individual Indians held title in fee simple absolute to their several allotments. The undivided interests which they originally owned in tribal property had been effectually partitioned in the process of allotment provided by the act of March, 1893, and subsequent acts supplemental thereto. Any reversionary interest of the United States dependent upon possible abandonment of the land or extinction of the tribe had been relinquished.

The United States, therefore, had no proprietary right legal or equitable to protect or safeguard by suit or otherwise. Moreover, the Indians had become citizens of the United States and of the State of Oklahoma and had become entitled to all the rights, 153 privileges and immunities of such citizens. As a result of all these things guardianship of the Government over them had ceased and the Indians had become completely emancipated from federal control. Laws restricting alienation, hereafter referred to, had been passed for their protection, but this fact does not militate against the completeness of their emancipation. *Matter of Heff*, 197 U. S. 488.

With no title legal or equitable to protect, and no duty of a trust character to perform, a new head of equity jurisdiction had to be discovered to justify the maintenance of these suits by the Government; and this, it is claimed, is found in the obligation of the government to enforce a great National policy. The *Debs* case, 158 U. S. 564, and others of that character are cited in support of this discovery; but they do not as I understand them justify Governmental intervention, in behalf of private citizens except in the discharge of duties entrusted to the care of the Nation by the Constitution. The intervention of the Government in the *Debs* case appears to be justified on the ground that power over interstate commerce and the transportation of the mails was vested in the National Government by the Constitution. Conceding, however, without admitting, that the Government may intervene as complainant to redress the wrongs of a limited number of citizens arising out of matters not committed to its control by the Constitution, I think the National policy with respect to the Five Civilized Tribes is entirely inconsistent with the right or duty of the United States to institute suit in its own name for their benefit. The majority opinion dwells largely upon that part of the Indian policy which prevailed before the cessation of the National guardianship, that part of it which concerned the treatment of the Indians before emancipation when a duty rested upon the Government to protect them and prepare them for citizenship; but that time and that duty have passed away. Congress in its wisdom has determined that the Indians of the Five Civilized Tribes are now fit for citizenship and qualified to perform its duties and carry its responsibilities. It has accordingly modified its former

policy to meet the new conditions. It has endowed the Indians with rights and responsibilities intended and calculated to develop self-reliance, independence and thrift. Citizenship has been conferred upon them and title to lands in fee simple has been vested in them with the expectation that the responsibilities incident thereto: the defense of their rights, the redress of their wrongs, the establishment of homes, the support of themselves and their families and generally speaking, the practice of the arts of civilized life may aid them in their social and economic development. In view doubtless of the cupidity of men and of their own natural improvidence Congress with a view of encouraging and aiding them in their upward progress enacted (35 Stat. 312) that "All allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any
154 other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one" except by permission of the Secretary of the Interior.

The foregoing considerations, in my opinion, indicate that Congress has adopted a new policy concerning these Indians, namely: the promotion of self-reliance, self-respect, economy and thrift, and to this end after making the special provision above indicated and perhaps others of like character, has left them otherwise subject to general laws governing all citizens. Equality of opportunity is all an American citizen ought to demand; and this and more in the respects just indicated Congress has given the members of the Five Civilized Tribes. With these special provisions made in their behalf the legislative intent and purpose seems to have been to leave them to justify their right to citizenship by coping with other citizens in the affairs of life on an equal footing without the expectation or hope of other special Governmental intervention. Such intervention in the way of institution of suits at wholesale as done in these cases without the request or consent of the Indians is not only humiliating in itself but tends to defeat the true National policy by discouraging self-reliance and independence of action.

The policy of encouraging and aiding the Indians to act for themselves independently, rather than of aggressively interfering without their consent, to assert their statutory rights is distinctly recognized if not commanded in Sec. 6 of the act of May 27, 1908, above cited. Sec. 1 of that act as already pointed out imposes certain restrictions upon the alienation of lands by the Indians. Sec. 6 after authorizing the Secretary of the Interior or his representatives to take special interest in behalf of minors under guardianship enacts that: "said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and

expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands."

Notwithstanding other provisions of the act, referred to in the opinion of the majority, I think the part just quoted manifests a clear legislative intent and purpose that the United States by and through the Secretary of the Interior should act with respect to the violation of restrictions primarily in an advisory way and instead of ever bringing suits in its own name at pleasure, should bring 155 them only when requested by allottees and then only in their names.

If these suits can be maintained it is not apparent where the Government can stop in its litigation in behalf of private persons in the enforcement of National policies. There are certainly many recognized policies besides the Indian policy which might be materially subserved by the practice of Governmental intervention as in this case. Where would it end?

In my opinion the judgment below should be affirmed.

Filed June 8, 1910.

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(Decree.)

And on the eighth day of June, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term 1910.

WEDNESDAY, June 8, 1910.

No. 3163.

THE UNITED STATES OF AMERICA, Appellant,

vs.

ALFRED F. GOAT et al.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in

this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to proceed in accordance with the views expressed in the opinion of this Court.

June 8, 1910.

(Petition for Rehearing.)

And on the thirteenth day of July, A. D. 1910, a petition of appellees for a rehearing was filed in said cause, in the words and figures following, to-wit:

157 United States Circuit Court of Appeals, Eighth Circuit.

No. 3150—United States, Appellant, v. James P. Allen, et al.

No. 3151—United States, Appellant, v. N. E. Patterson, et al.

No. 3152—United States, Appellant, v. Charles E. McPherrin, et al.

No. 3153—United States, Appellant, v. F. B. Severs, et al.

No. 3154—United States, Appellant, v. Wilson Bruton, et al.

No. 3155—United States, Appellant, v. Norman Pruitt, et al.

No. 3156—United States, Appellant, v. James Jefferson, et al.

No. 3157—United States, Appellant, v. J. J. Creamer, et al.

No. 3158—United States, Appellant, v. Felix R. Philips, et al.

No. 3159—United States, Appellant, v. J. M. Dickenson, et al.

No. 3160—United States, Appellant, v. James P. Allen, et al.

No. 3161—United States, Appellant, v. Walter F. Nichols, et al.

No. 3162—United States, Appellant, v. John F. McClellan, et al.

No. 3163—United States, Appellant, v. Alfred P. Goat, et al.

No. 3265—United States, Appellant, v. George C. Crump, et al.

No. 3276—United States, Appellant, v. C. J. Benson, et al.

No. 3279—United States, Appellant, v. J. O. Davis, et al.

Petition for Rehearing.

The appellees in each of the above and foregoing causes respectfully petition this court to set aside the order of reversal herein and grant to them and each of them a re-hearing for the following reasons, to-wit:

158 First. This court erred in holding that the Circuit Court of the United States had jurisdiction over the subject matter of controversy involved in the various actions.

Second. This court erred in holding that the United States had capacity to bring and maintain these suits in the Circuit Court of the United States.

Third. This court erred in holding that the United States may bring and maintain these suits to enforce a supposed policy.

Fourth. This court erred in holding that the citizenship conferred upon the members of the Five Civilized Tribes did not destroy the right, if it ever existed, of the United States to bring and maintain

suits for the individual property of such citizens without their knowledge or consent and without making them a party to such action.

Fifth. This court erred in holding as follows: "If these Indians may be divested of their lands, they will be thrown back upon the nations, a pauperized, discontented and possibly belligerent people. To prevent such results the United States may invoke the aid of its courts."

Sixth. This court erred in holding that the United States may maintain an action in equity to determine the validity of the conveyances involved, and that such action is not binding upon the owner of the land and would afford no protection to the defendant in this suit in a subsequent proceeding instituted by the allottee.

Seventh. This court erred in determining and establishing a policy for Congress in relation to the allotment of the lands of the Five Civilized Tribes of Indians.

Eighth. That the court, as evidenced by its opinion, wholly misapprehends the conditions existing with reference to the allotment of lands to the members of the Five Civilized Tribes of Indians.

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Argument.

No effort will be made to discuss separately the reasons set forth why the petition for re-hearing herein should be granted; nor is it proposed to cover those grounds specifically covered in the briefs filed on behalf of the various appellees. It is deemed desirable to discuss some of the views promulgated and results declared in the majority opinion and the necessary results that will flow therefrom in an endeavor to establish that the result of the conclusions will be destructive of the principles of equity jurisprudence and impairment of the rights of citizenship, state and national, and an establishment of a control heretofore unheard of — the rights, privileges and immunities of citizens.

As we interpret the opinion of the court, it is held:

1st. That the allottees of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges and immunities of such citizenship.

2nd. That the United States has neither a legal nor an equitable estate in the lands involved.

3rd. That the jurisdiction of the trial court is sustained upon the ground that the United States may invoke such jurisdiction for the enforcement of its policy.

4th. That if the Indians may be divested of their lands they will be thrown back upon the nation, a discontented, pauperized, and possibly war-like people.

5th. That a violation or disregard of a law of the United States authorizes the maintenance of an action in the name of the United States to enforce its policy to see that its laws are observed.

6th. "That Congress by its own declaration could have placed that question [of jurisdiction or right to maintain suits] beyond controversy and the courts ought not to give a meaning to its acts which

would make of them a mere squandering of public funds."

160 7th. That the negative declaration contained in the Act of May 27th, 1908, is equivalent to affirmative legislation.

8th. That the appellees may be required to litigate with the United States all of the questions involved and that the result of such litigation is neither *res judicata*, nor the slightest protection to them in any suit that may be instituted by the allottees upon the same cause of action asserted by the United States.

Jurisdiction Founded Upon Policy.

It is stated in the opinion that to prevent the results therein described United States may invoke the aid of its courts, and "That question was put to rest in the decision of in *re Debbs*, 158 U. S. 564."

It is respectfully submitted that the decision of the Supreme Court of the United States in *re Debbs* affords no precedent for maintaining jurisdiction in the cases at bar. One of the governmental functions of the United States is the transportation of its mails. That function bears no relation whatever to the personal and individual transactions involved in this litigation. The prompt and efficient transportation of the mails is both a duty of the government and a burden assumed by it. Such a duty is imposed by numerous statutes and established by generations of usage. It is a duty to the public, the whole nation—a governmental function. It is not a governmental function to bring a suit against one citizen in favor of another, nor does it bear any resemblance thereto.

But it is said that the possibility of the Indians becoming pauperized and discontented and possibly war-like, affords grounds to invoke the jurisdiction of the court. The parties on whose behalf these suits are brought are citizens and residents of the State of

Oklahoma. The burden of caring for these citizens of the
161 State of Oklahoma, if they become pauperized, is upon the state and not upon the nation. If it is a governmental function to pacify the discontented, that function would perhaps rest on the State of Oklahoma and not the national government. The matter of maintaining peace within the boundaries of the State of Oklahoma is with the State of Oklahoma and not with the national government. If a theoretical policy may confer jurisdiction or authorize the maintenance of a suit, is not the State of Oklahoma, under the reasoning of the court, the proper party to maintain these actions?

But it is submitted that the court has fallen into error in not distinguishing between the discharge of a governmental function and intermeddling in controversies between its citizens. It is said that if the government's interest in its measures, meaning, we presume, laws, does not give it a standing in court, then the violation of those measures (laws) must go wholly without redress. No reason is urged to sustain this statement. In a subsequent part of the opinion it is held that the allottee may bring a suit to accomplish the identical results sought to be accomplished by these suits. May the court indulge in a presumption that he will not do so, and in

that event the United States must do so, and because the United States must do so that forsooth the court has jurisdiction? It is not believed that jurisdiction founded upon such grounds can be properly sustained.

It is said in another part of the opinion, "Congress by its own declaration could have placed that question beyond controversy."

* * * Let it be conceded that Congress declined so to do. Is not the very fact that Congress has declined, after its attention has been called to the matter, to place the jurisdiction beyond controversy the very strongest evidence that Congress did not intend the exercise of such jurisdiction?

It is said that the trial court used a dangerous standard of interpretation when it considered what Congress refused to do. Does not the interpretation adopted by this court give much more effect to the non-action of Congress than does the opinion of the trial court?

162 The United States can invoke jurisdiction of its courts only when authorized by law so to do. No statute has been found authorizing the maintenance of these suits. This court finds public policy a source of jurisdiction, although Congress has not directly or indirectly said so.

It was insisted in the trial court that public policy conferred jurisdiction. The trial court was searching for evidence of that public policy. It was claimed to be found in the action of Congress, but no one was able to point out in what particular action. Might not the trial court properly consider the fact that Congress' attention was called to the assertion of jurisdiction and that it was invited to declare the existence of the same, and that it did not do so, in determining whether or not Congress had conferred such authority? Was not the failure to confer jurisdiction upon request of the department, which asserted its existence, a denial of that request and a denial of the authority asserted? If it was not a denial, was it not a competent matter for consideration in determining the existence of the policy? Is not the opinion of this court in this action based more upon the non-action than upon the affirmative action of Congress? Upon negative declarations rather than upon affirmative declarations? The reasoning of the trial court is criticized for accepting the non-action of Congress as some evidence of the absence of jurisdiction and at the same time a negative declaration is given the force and effect of an affirmative declaration?

This court says "the allottees in the present case do not come within the class of indispensable parties as thus defined. The cause of action set up in the bill is not theirs, but the government's. True, if the government succeeds their title will be cleared of clouds; but if it does not succeed they will be left with their personal causes of action unaffected by what is done in the present litigation. It may be said that this very fact makes the presence of the allottees necessary to complete justice to the defendants. While the measure of justice in their favor would be more complete if the

allottees were present, that fact does not render the allottees indispensable parties." This is a novel position. The government has a cause of action and the individual has a cause of action, both based upon one single alleged wrong, and a suit by the government upon this cause of action is not res judicata as against the allottee, and we presume upon the same reasoning a suit by the allottee would not be res judicata against the government. In other words, the net result is that there is a particular public policy which overturns the law of jurisdiction, the law of res judicata, the law with reference to who are indispensable parties, all for the purpose of trying a law suit which accomplishes nothing and binds nobody. The defendants in these law suits may be harrassed as long as appropriation may be made, or until final judgment is rendered and if in their favor they have a fruitless victory, which affords them no measure of protection against future litigation of the same kind. It is asserted that court of equity may, and should, lend its aid to an accomplishment of this purpose.

It seems to us unconscionable to permit the prosecution of these suits with the express declaration in advance that a judgment in favor of the defendants would afford them no measure of protection except against the costs of the particular action; that upon the

164 next day thereafter the government may aid and abet an

Indian under the provisions of the Act of May 27th, 1908, to institute a suit in his own name for re-trial of the issues here involved, or he may do so on his own initiative, and as many more as he may see fit to lug in. We most earnestly protest that no court has ever before held to a doctrine of this character; that such a doctrine not only means but invites interminable litigation and denies to one party to such litigation any beneficial result whatever that should arise therefrom.

It is earnestly urged that this court erred in reversing the judgment of the trial court, and that the opinion of the trial court and of the circuit judge dissenting, are correct interpretations of the law and that a rehearing should be granted and the judgment of the trial court affirmed.

Respectfully submitted,

S. T. BLEDSOE,
For the Various Appellees.

I, S. T. Bledsoe, counsel for appellees in the above causes, do hereby certify that the petition for re-hearing is not interposed for delay and that in my opinion the same is well-founded in point of law.

S. T. BLEDSOE,
Counsel for Appellees.

(Endorsed:) Filed Jul- 13, 1910. John D. Jordan, Clerk.

165 (*Order Denying Petition for Rehearing.*)

And on the twentieth day of August, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition of appellees for a rehearing in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term,
1910.

SATURDAY, August 20, 1910.

No. 3163.

THE UNITED STATES OF AMERICA, Appellant,
vs.
ALFRED F. GOAT et al.

Appeal from the Circuit Court of the United States for the Eastern
District of Oklahoma.

This cause came on this day to be heard upon the petition for a
rehearing, filed by Counsel for Appellees.

On Consideration Whereof, it is now here ordered by this Court,
that said petition for a rehearing of this cause, be, and the same is
hereby, denied.

August 20, 1910.

(Petition for Appeal to Supreme Court U. S.)

And on the thirty-first day of August, A. D. 1910, a petition for
an appeal to the Supreme Court of the United States was filed in said
cause, in the words and figures following, to-wit:

In the Circuit Court of Appeals for the Eighth Circuit.

Number 3163.

UNITED STATES, Appellant,
vs.
ALFRED F. GOAT et al., Appellees.

Petition for Appeal.

Alfred F. Goat and others, the appellees in this cause in this court,
feeling themselves aggrieved by the order and judgment of reversal
made and entered therein on the 8th day of June, 1910, at a
166 day of the 1910 May Term of this court, do hereby pray an
appeal from said order and judgment to the Supreme Court
of the United States for the reasons specified in the assignment of
errors filed herewith; and they further pray that a transcript of
the record and proceedings upon which said order and judgment was
based, duly authenticated, may be sent to the Supreme Court of the
United States, and your petitioners further pray that a proper order
touching the security to be required of them for costs to perfect this
appeal be made.

S. T. BLEDSOE,
B. B. BLAKENEY,
H. H. ROGERS,
Att'ys for Appellees.

The above appeal allowed in open court this 31st day of August, 1910.

WALTER H. SANBORN,
Presiding Judge.

(Endorsed:) No. 3163. In the Circuit Court of Appeals for the Eighth Circuit. United States, Appellant, vs. Alfred F. Goat, et al., Appellees. Petition for Appeal. The security furnished by the within bond is hereby approved this August 31, 1910. Walter H. Sanborn, Willis Van Devanter. Filed Aug. 31, 1910, John D. Jordan, Clerk.

(Affidavits as to Value of Property in Controversy.)

And on the thirty-first day of August, A. D. 1910, an affidavit as to value of the property in controversy was filed in said cause, in the words and figures following, to-wit:

In the Circuit Court of Appeals of the Eight- Circuit.

UNITED STATES, Appellant,

vs.

ALFRED F. GOAT et al., Appellees.

I, B. B. Blakeney, being first duly sworn on oath, do say, That I am familiar with several of the tracts and parcels of land involved in the above suit and particularly with the South half and the North-east of the Southwest Quarter of section Twenty three (23) in township ten (10) North of range Five (5) east, Indian Meridian which is held by Alfred F. Goat and that the value of the said
167 land above described exceeds in value the sum of one thousand dollars (\$1000.00).

B. B. BLAKENEY.

Subscribed and sworn to before me this 27th day of August, 1910.

[SEAL.]

WILLIAM P. Z. GERMAN,

Notary Public.

My Commission Expires June 26, 1912.

(Endorsed:) No. 3163. The United States of America, Appellant, vs. Alfred F. Goat, et al. Affidavit as to value of property in controversy. Filed Aug. 31, 1910, John D. Jordan, Clerk.

(Assignment of Errors on Appeal to Supreme Court U. S.)

And on the thirty-first day of August, A. D. 1910, an assignment of errors on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

Number 3163.

THE UNITED STATES OF AMERICA, Appellant,

VS.

ALFRED F. GOAT et al., Appellees.

Assignment of Errors.

Alfred F. Goat and others, the appellees in the above entitled cause, respectfully assert and show to the court that in the opinion of this Honorable Court in the above cause reversing the judgment of the trial court, the following errors were committed to their prejudice:

First. The court erred in holding that the United States had such interest as would authorize a maintenance of this suit in the Circuit Court of the United States.

Second. The court erred in holding that the United States had the capacity to bring and maintain this suit in a Circuit Court of the United States.

Third. The court erred in holding that the Circuit Court of 168 the United States had jurisdiction over the subject matter in controversy involved in this action.

Fourth. The court erred in holding that the conferring of national and state citizenship upon members of the Five Civilized Tribes was not inconsistent with and prohibitive of the right of the United States to bring and maintain suits for the alleged recovery of or removal of a cloud upon the title of the individual property of such citizens without their knowledge or consent, and without making them a party to the suit.

Fifth. That the court erred in not holding that the allottees or heirs on whose behalf this suit is brought were indispensable parties.

Sixth. The court erred in holding that there is a policy of the Government of the United States which authorizes the institution and maintenance of this suit.

Seventh. The court erred in holding that a judgment in this action would not be res judicata as against a proceeding instituted by the allottees in their own name, respectively, to recover the same tract or parcel of land.

Eighth. That the court erred in holding as follows: "If these Indians may be divested of their lands, they will be thrown back upon the Nation, a pauperized, discontented, and possibly, belligerent people. To prevent such results the United States may invoke the aid of its courts."

Ninth. The court erred in reversing the judgment of the trial court without having first determined that the lands sued for were subject to restrictions upon alienation, and whether said reservations had been removed.

Tenth. The court erred in holding that the bill was not multifarious and that the convenience of the defendants is conserved by joining all in one action.

Eleventh. The court erred in holding that the grant of citizenship, state and national, left the Indian and his property subject to the control of the national government.

169 Twelfth. The court erred in holding that Congress could enlarge or extend restrictions upon alienation.

Thirteenth. The court erred in reversing the judgment of the trial court.

Fourteenth. The court erred in reversing the judgment of the trial court as to these appellees, because the only grounds upon which the validity of appellees' conveyances is assailed is that it is in violation of statute prohibiting conveyance by allottees of lands of Freedmen of the Seminole Tribe, when there was no such legislation in existence.

Fifteenth. The court erred in reversing the judgment of the Circuit Court of the United States for the Eastern District of Oklahoma, because the bill filed in said Circuit Court did not state a cause of action in favor of the appellant and against appellees.

Sixteenth. That the court erred in reversing the judgment of the trial court as to these appellees, because the only grounds upon which the validity of appellees' conveyances are assailed is that they are in violation of the statutes of the United States prohibiting conveyancing, when the bill in this cause discloses upon its face that at the time of the said conveyances to appellees no restrictions existed under any Act of Congress, because same had been entirely removed by Act of Congress, and the bill therefore stated no cause of action, and no equity.

Seventeenth. That all of said errors were prejudicial to the rights of appellees. They therefore pray that the judgment of the Circuit Court of Appeals be reversed, and that the judgment of the trial Court be affirmed.

S. T. BLEDSOE.

B. B. BLAKENEY,

H. H. ROGERS,

Att'ys for Appellees.

(Endorsed:) Number 3163. In the Circuit Court of Appeals for the Eighth Circuit. United States, Appellant, vs. Alfred F. Goat, et al., Appellees. Assignment of Errors. Filed Aug. 31, 1910, John D. Jordan, Clerk.

170 (*Supersedeas Bond on Appeal to Supreme Court U. S.*)

And on the thirty-first day of August, A. D. 1910, a supersedeas bond on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the Circuit Court of Appeals for the Eighth Circuit.

Number 3163.

UNITED STATES, Appellant,
vs.
ALFRED F. GOAT et al., Appellees.

Cost Bond on Appeal.

Know all men by these presents: That we, Alfred F. Goat, S. C. Foreman, Iowa Wry, T. S. Cobb, James A. Chapman, T. S. Hine, N. A. White, T. T. Godfrey, N. Bert Smith, J. P. Davis, Young Pepper, John Laborde, Frank Laborde, Chas. H. Weinberg, B. F. Davis, L. C. Parmenter, Thomas Ragland, Harrison Street, Donald Campbell, E. E. Jayne, John Silas, Chas. O. Tate, L. T. Sammons, Samuel Norton, Frank Reed, H. A. Ingram, R. H. McCormick, A. M. Seran, A. G. Mahue, L. B. Helliker, William Jarvis, W. B. B. Smith, Geo. C. Crump, A. L. Reed, H. H. Rogers, R. L. Thurmond, Sam Pack, R. W. Blair, J. C. Greer, O. D. Smith, M. L. Son, are held and firmly bound unto the United States of America in the full and just sum of Five hundred Dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, jointly and severally be these presents.

Sealed with our seals and dated this the 31st day of August, in the year of our Lord, One Thousand Nine Hundred and Ten.

Whereas, lately, at the May, 1910, term of said court, in a suit pending therein on appeal from the Circuit Court of the United States for the Eastern District of Oklahoma, between the United States, Appellant, and Alfred F. Goat and others, Appellees, the judgment of the trial court was reversed, and,—

Whereas, the said Alfred F. Goat and others have prayed
171 for and obtained in open court an appeal from said judgment of reversal to the Supreme Court of the United States in the aforesaid suit.

Now, the condition of this obligation is such that if the said Alfred F. Goat and others, Appellees herein, shall prosecute said appeal to effect and answer all costs if they fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and effect.

ALFRED F. GOAT,
S. C. FOREMAN,
IOWA WRY,
T. S. HINE,
N. A. WHITE,
T. T. GODFREY,
N. BERT SMITH,
J. P. DAVIS,
YOUNG PEPPER,
JOHN LABORDE,

FRANK LABORDE,
CHAS. H. WEINBERG,
B. F. DAVIS,
DONALD CAMPBELL,
E. E. JAYNE,
JOHN SILAS,
CHAS. O. TATE,
L. T. SAMMONS,
SAMUEL NORTON,
H. A. INGRAM,
R. H. McCORMICK,
A. M. SERAN,
A. G. MAYHUE,
L. B. HELLIKER,
WILLIAM JARVIS,
W. B. B. SMITH,
GEO. J. CRUMP, JR.,
T. S. COBB,
JAMES A. CHAPMAN,
A. L. REED,
C. G. CRUMP,
H. H. ROGERS,
R. L. THURMOND,
SAM PACK,
R. W. BLAIR,
J. C. GREER,
HARRISON STREET,
FRANK H. REED,
L. C. PARMENTER,
THOMAS RAGLAND,
O. D. SMITH, AND
M. L. SON.
By Their Attorney B. B. BLAKENEY.
[SEAL.] SOUTHERN SURETY COMPANY.
E. G. DAVIS, *Secretary*.

Scaled and Delivered in the presence of:

Witnesses:

F. A. UNGLES.

(Endorsed:) Number 3163. In the Circuit Court of Appeals for the Eighth Circuit. United States, Appellant, vs. Alfred F. Goat, et al., Appellees. Supersedeas Bond on Appeal. The security furnished by the within bond is hereby approved to work a supersedeas this 31st day of August, 1910. Walter H. Sanborn, Willis Van Devanter. Filed Aug. 31, 1910, John D. Jordan, Clerk.

(*Order Allowing Appeal to Supreme Court U. S.*)

And on the thirty-first day of August, A. D. 1910, an order allowing an appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

172 In the Circuit Court of Appeals for the Eighth Circuit.
Number 3163.

UNITED STATES, Appellants,
vs.
ALFRED F. GOAT et al., Appellees.

Order Allowing Appeal.

On this the 31 day of August, 1910, the same being a day of the regular May 1910 Term of this court, the prayer of Alfred F. Goat and others, the appellees in this cause in this court, for an appeal from the order and judgment of reversal herein to the Supreme Court of the United States, and for an order fixing the security for costs to be required of them to perfect their appeal, after hearing the same and being duly advised in the premises.

It is hereby ordered that the appeal as prayed for be granted, and that the said appellees, Alfred F. Goat and others, be required to execute an appeal bond in the sum of Five hundred Dollars, to answer for all costs if they shall fail to make good their plea, with sureties to be approved by this court.

WALTER H. SANBORN.
WILLIS VAN DEVANTER.

(Endorsed:) Number 3163. In the Circuit Court of Appeals for the Eighth Circuit. United States, Appellant, vs. Alfred F. Goat et al., Appellees. Order allowing Appeal. Filed Aug. 31, 1910. John D. Jordan, Clerk.

173 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript, pages 1 to 173, inclusive, contains full, true and complete copies of all the pleadings, record entries and proceedings including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause in said Court wherein The United States of America is Appellant and Alfred F. Goat, et al. are Appellees, No. 3163, as full, true and complete as the original of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-second day of September, A. D. 1910.

[Seal United States Circuit Court of Appeals,
Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

174 In the Supreme Court of the United States of America.

No. 713.

ALFRED F. GOAT et al., Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

Stipulation to Print Record.

It is hereby agreed by and between the solicitors for the respective parties to the above entitled cause that the Clerk of this court do prepare and cause to be printed the papers and all endorsements thereon hereinafter stated, omitting all others in said transcript included, to-wit:

1. The entire Bill in Equity, excepting therefrom all the following numbered pages of the original bill, to-wit: 12 to 30 and 32 to 54, inclusive, as same are numbered in this court, it being the intention of the parties to leave and be printed as a part of the bill the following pages of the original bill which touch different conveyances, to-wit:

Page.	Principal defendant.	Degree of blood.
11.....	Alfred F. Goat.....	Freedman, Seminole
31.....	A. G. Mayhue.....	Freedman, Seminole

2. The appearance of solicitors.

3. Demurrers of appellants.

4. Order, decree and opinion of Judge Ralph E. Campbell, sustaining demurrer and dismissing bill.

5. Petition and order for appeal by the United States of America.

6. Assignments of error filed by the United States of America.

7. Copy of opinion of Circuit Court of Appeals in the case of United States of America, appellant, vs. Alfred F. Goat, et al., appellees.

8. Petition of Alfred F. Goat, et al., for appeal to the Supreme Court of the United States and order of Circuit Court of Appeals allowing same.

9. Assignments of error and bond filed in the Circuit Court
175 of Appeals by Alfred F. Goat, et al.

10. This stipulation of parties for printing the record.

11. All orders of the Circuit Court and Circuit Court of Appeals. The above stipulation requires the printing of the following pages of the record of this court, to-wit:

Pages 1 to 11, inclusive;

Page 31;

Pages 55 to 63, inclusive;

At page 69 commence at line six, incorporating the words No. 4 and print remainder of page;

Page 70 and first seven lines of Page 71;

Pages 73 to 105, inclusive;

The first eight lines of Page 106 and in line 46 of Page 107 the words "Alfred F. Goat, et al.," so that of pages 106 and 107 the following shall be inserted:

"Motion to Make Order and Decree Applicable in Fourteen Cases Only in the Circuit Court of the United States of America for the Eastern District of Oklahoma.

THE UNITED STATES OF AMERICA, Complainant,

vs.

ALFRED F. GOAT et al.

Motion.

All of page 108 except the first seven lines and the last six lines.

All of page 109 except the first seven lines;

Pages 110 to 124, inclusive;

Page 125, except the two lines in the upper right hand corner which read as follows:

"To be used in Bill No.

359, Seminole Freedman."

Pages 126 to 130, inclusive;

Page 131 except the first twelve lines;

Pages 141 to 173, inclusive.

B. B. BLAKENEY AND

H. H. RODGERS,

Solicitors for Appellant.

F. W. LEHMANN,

Solicitor for Appellee.

176 [Endorsed:] File No. 22,234. Supreme Court U. S. October Term, 1910. Term No. 713. Alfred F. Goat et al. Appellants, vs. The United States. Stipulation to omit parts of record in printing. Filed February 27, 1911.

Endorsed on cover: File No. 22,234. U. S. Circuit Court Appeals, 8th Circuit. Term No. 405. Alfred F. Goat et al., appellants, vs. The United States. Filed October 3d, 1910. File No. 22,334.

Office Supreme Court, U. S.
FILED.

OCT 13 1911

JAMES H. McKENNEY,

CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 405.

ALFRED F. GOAT ET AL., APPELLANTS,

vs.

THE UNITED STATES.

BRIEF OF APPELLANTS.

GEO. C. CRUMP,
H. H. ROGERS,
J. H. MOXEY,
J. H. MILEY,

Attorneys for Appellants.

B. B. BLAKENEY,

Of Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1911.

No. 405.

ALFRED F. GOAT ET AL., APPELLANTS,

vs.

THE UNITED STATES.

BRIEF OF APPELLANTS.

Statement.

The United States as complainant commenced this action in the Circuit Court of the Eastern District of Oklahoma to set aside certain conveyances made by allottees of the Seminole Nation. This was one of several actions instituted by the Government against many thousand defendants to set aside the conveyances of all the allottees of the Five Civilized Tribes. It is, however, the only action instituted to annul the conveyances made by allottees *not having Indian blood*.

To this bill the many defendants appearing filed demurrers upon the grounds that the bill stated no equity; that the Government did not have capacity to sue; that the court

did not have jurisdiction, as well as on other grounds; and the circuit court sustained the demurrer. The complainant appealed to the Circuit Court of Appeals, and the decree of the circuit court was there reversed. The appellants have from the decree reversing the circuit court appealed to this court.

The bill filed in the circuit court in this case embraced only such lands as had been set apart to the Freedmen of this tribe as their surplus allotments. Under the treaty forty acres were distributed to the several members of the tribe as their homesteads, but none of these allotments are involved in this action. The surplus lands were also distributed to the members of the tribes, and the conveyances sought herein to be canceled are of the surplus allotments of allottees who have no Indian blood and are designated as Freedmen. The United States based its right of recovery upon the theory that the members of said tribe, whether Freedmen or of Indian blood, were without authority to convey their lands, and that their conveyances are, therefore, void and their record creates clouds upon the allottees' title.

It will be conceded that Freedmen of other tribes may convey, so that no particular policy exists for the distinction, and it must be based entirely upon the plain provisions of the law.

The demurrers filed herein raise the following questions:

- (1) Has the court jurisdiction?
- (2) Is there a defect of parties?
- (3) Do the bills state equity?
- (4) Has the complainant capacity to sue?

In order to discuss these questions intelligently, it is necessary to review the various treaties and acts of Congress relating to the title to the lands in the Seminole Nation.

By the treaty of Payne's Landing, concluded May 9, 1832, proclaimed April 12, 1834, it was provided, in article 1 thereof:

"The Seminole Indians relinquish to the United States all claims to lands they at present occupy in the territory of Florida, and agree to emigrate to the country assigned to the Creeks, west of the Mississippi river; it being understood that an additional extent of territory, proportioned to their numbers, will be added to the Creek country, and that the Seminoles will be received as a constituent part of the Creek Nation, and be readmitted to all privileges as members of the same." (Kappler's Laws and Treaties, vol. 2, p. 344.)

The treaty of February 14, 1833, with the Creeks, provided, in article 4 thereof, as follows:

"It is hereby mutually understood and agreed between the parties to this treaty, that the land assigned to the Muskogee Indians, by the second article thereof, shall be taken and considered the property of the whole Muskogee or Creek Nation, as well of those now residing upon the land, as the great body of said Nation who still remain on the east side of the Mississippi; and it is also understood and agreed that the Seminole Indians, of Florida, whose removal to this country is provided for by their treaty with the U. S., dated May 9, 1832, shall also have a permanent and comfortable home on the lands hereby set apart as the country of the Creek Nation; and they (the Seminoles) will hereafter be considered a constituent part of said Nation, but are to be located on some part of the Creek country by themselves, which location will be selected for them by the commissioners who have signed these articles of agreement or convention." (Kappler's Laws and Treaties, vol. 2, p. 390.)

As to the estate of the Creeks in the lands upon which the Seminoles were to be located by commissioners, as above ex-

plained, it was a fee-simple conveyed by patent, in pursuance of article 3 of the said treaty of February 14, 1833, which article reads as follows:

"The United States will grant a patent in fee-simple to the Creek Nation of Indians for the lands assigned said Nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States, and the right thus guaranteed by the United States shall be continued to said Tribe of Indians, so long as they shall exist as a Nation, and continue to occupy the country hereby assigned them." (Kappler's Laws and Treaties, vol. 2, p. 390.)

By the treaty with the Seminoles of March 28, 1833, proclaimed April 12, 1834, the lands selected by said commissioners as a location for the Seminoles was designated by metes and bounds and assigned to them. This was an immense tract lying between the Canadian and the North Fork thereof, and extending westward to where a north and south line would strike the forks of Little river, but not further westward than twenty-five miles from the mouth of said Little river. (Kappler, vol. 2, p. 394.)

From the treaty with the Creeks and Seminoles of January 4, 1845, proclaimed July 18, 1845, it appears that the relations between the Creeks and Seminoles were not such as the Government desired, and the Seminoles expressed a desire to settle in a body on Little river, some distance westward of their residence at that time. (Kappler's Laws and Treaties, vol. 2, p. 550.)

By article 1 of the treaty with the Creeks and Seminoles of August 7, 1856, the Creek Nation granted, ceded, and conveyed to the Seminole Indians the tract of country included within the following boundaries, viz:

"Beginning on the Canadian river, a few miles east of the ninety-seventh parallel of west longitude, where Ock-hi-appo, or Pond Creek, empties into the same; thence due north to the North Fork of the

Canadian; thence up said North Fork of the Canadian to the southern line of the Cherokee country; thence with that line, west to the one hundredth parallel of west longitude; thence south along said parallel of longitude to the Canadian river, and thence down and with that river to the place of beginning." (Kappler, vol. 2, p. 757.)

Article 2 of said treaty of 1856 describes the boundaries of the Creek country, and article 3 thereof is as follows:

"The United States do hereby solemnly guarantee to the Seminole Indians the tract of country ceded to them by the 1st article of this convention; and to the Creek Indians, the lands included within the boundaries defined in the second article hereof; and likewise that the same shall respectively be secured to and held by said Indians by the same title and tenure by which they were guaranteed and secured to the Creek Nation by the fourteenth article of the treaty of March twenty-fourth, eighteen hundred and thirty-two, the third article of the treaty of February fourteenth, eighteen hundred and thirty-three, and by the letters patent issued to the said Creek Nation, on the eleventh day of August, eighteen hundred and fifty-two, and recorded in volume four of records of Indian Deeds, in the office of Indian Affairs, pages 446 and 447: *Provided, however,* That no part of the tract of country so ceded to the Seminole Indians shall ever be sold, or otherwise disposed of, without the consent of both tribes legally given." (Kappler, vol. 2, p. 757.)

By the treaty of June 14, 1866, with the Creeks, that tribe, by article 7 of said treaty, agreed as follows:

"The Creeks hereby agree that the Seminole Tribe of Indians may sell and convey to the United States all or any portion of the Seminole lands upon such terms as may be mutually agreed upon by and between the Seminoles and the United States." (Kappler, vol. 2, p. 934.)

"Nation agrees to pay therefor the price of fifty

cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written." * * * (Kappler, vol. 2, p. 911.)

It therefore appears that the Seminole Nation, prior to allotment, was the absolute owner of its domain in fee-simple; that its lands were acquired by purchase from the United States; and that its title was evidenced by a treaty with the Government.

The United States, in its brief filed in the Circuit Court of Appeals, stated its contention clearly in the following excerpt:

"In the argument in the lower court, our contention was that the Seminole lands were all tribal and not yet passed to the allottees so as to be alienable. They had not been given with restrictions on alienation, but the title had not been given, and the allottee could not alienate what he did not own."

The Government has recognized the right of freedmen of all the other tribes to convey their land, but denies this privilege to the Seminoles because of the peculiar provisions of the special treaties and congressional acts relating to the Seminole Nation. We think no such distinction can rightfully be made.

From an examination of all the treaties and acts of Congress it is apparent that the Seminoles had been treated and regarded as one of the Five Civilized Tribes and covered by the general legislation affecting the civilized tribes, and within the general policy of the Government to allot lands in fee simple to such members and break up the tribal relations.

These several tribes, now known and designated as the Five Civilized Tribes, were removed from their homes east of the Mississippi River to reservations in what has since been known as the Indian Territory. While the treaties of

removal were all made between the Government and the respective tribes in separate instruments, the same general provisions will be found in each of the early treaties. If any material distinction is discoverable it is favorable to Seminoles. As shown by reference to the treaty of March 21, 1866, certain lands were set apart to the Seminole Nation, with a provision that such lands should be *granted* by the United States to the Seminole Nation without any provisions as to the ultimate reversion in the Government. In the other treaties with the other members of the Five Civilized Tribes, the Government retained a reversion. While such reversionary interest was remote and perhaps impossible of realization, each of these treaties provided that upon the extinction of the tribes such land should revert, except the Seminole treaty.

The first act of Congress in any manner evidencing the intention of Congress to allot lands in the Indian Territory to the several members, and make such allottees citizens and terminate the tribal government, will be found in section 43 of the act of August 10, 1890. The whole section referred to indicates the intention of Congress to entirely break up the tribal relations in the Indian Territory. It in part says:

"That any member of any Indian tribe or nation residing in the Indian Territory, may apply to the United States court therein to become a citizen of the United States, and such court shall have jurisdiction thereof, and shall hear and determine such application as provided in the statutes of the United States."

The four grounds of our demurrer present widely variant objections to the maintenance of this action, but the jurisdiction of the circuit court, the defect of parties, and the capacity of the United States to maintain the action have been so fully presented to the court in the actions submitted with this that we feel that further argument would necessarily be wearisome repetition, and we will present the question only of the failure of the bill to state equity.

We will discuss the right of the Government as shown by this petition to resort to its court to set aside conveyances made by Seminole freedmen in so far only as it is necessary to show that the bill fails to state any grounds entitling it to relief. Before entering upon the main question we will analyze the relation of the Government with Seminole lands and allottees.

1st. Has the Government such property interest as to enable it to maintain this action? If the bill shows that the Government has no interest in the controversy, then it has no rights to protect or enforce.

2d. Does the bill state facts disclosing a policy which the Government is obligated or authorized to protect; that is, as generally stated, is the Government a general guardian of the Indian because of any duty or obligation it is required to perform toward the Indian?

First. Has the Government such a property interest as to enable it to maintain this action?

If the Seminole Nation claimed title to its lands by virtue of the conveyance from the Creek Nation by treaty of 1856, it might be seriously contended that the United States had some interest in the lands of said nation sufficient upon which to base the suits. But it will be remembered that the Seminole Nation, by treaty of March 21, 1866, conveyed to the United States all the lands that had theretofore been conveyed to it by the Creek Nation, and the United States at that time granted to the Seminole Nation the lands thereafter constituting the Seminole domain. This conveyance from the United States to the Seminole Nation was a GRANT; the land was located and described; there was no condition in the grant; it was absolute in its terms; none of the lands described were excepted or restricted in any manner; there was no provision by which the lands in any event might revert to the United States. The United States had

the right to make the grant. The grant was made by treaty and is just as valid as if it had been by act of Congress, and did not need a patent to protect it.

Best *vs.* Doe, 85 U. S., 112; 21 L. Ed., 805.

The land being selected and described by the treaty, the title passed to the Seminole Nation.

Schullenberger *vs.* Harriman, 21 Wall. (U. S.), 44; 22 L. Ed., 551.

Schow *vs.* Harriman, 154 U. S., 609; 22 L. Ed., 556.

As stated above, a grant by treaty is as valid as a grant by act of Congress, and the courts have universally held that where a grant, absolute in its terms, is made by Congress, such grant conveys the fee and possession.

M., K & T. Ry. Co. *vs.* Roberts, 152 U. S., 114; 38 L. Ed., 377.

New Mexico *vs.* United States Trust Co., 172 U. S., 182; 43 L. Ed., 411.

Jones *vs.* Mehan, 175 U. S., 1.

Mercantile Trust Co. *vs.* Atlantic & P. Ry. Co., 63 Fed., 911.

It is thus seen that the United States has absolutely no interest in the lands of Seminole allottees. Unless, therefore, it has some such duty to perform or obligation to discharge in connection with said allotments or their owners as would authorize the institution and maintenance of the suits, they must be dismissed.

Second. Does the bill show that the Government has any duty to perform or obligations to discharge in regard to the Seminole lands or the Seminole allottees?

We apprehend that such a duty or obligation cannot exist unless on the theory that there still continues between the United States and the Seminole tribe of Indians

the relationship of guardian and ward, described in the early decisions of the Supreme Court.

We concede that such a relationship did exist in the dealings of the United States with the Indian tribes for a certain period in the history of our country; and the courts very properly respected the same. As early as the case of the *Cherokee Nation vs. Georgia*, 5 Pet., 1, it was decided that this relationship was in some respects similar to that of guardian and ward. This relationship continued more or less in all the dealings of the United States with the several Indian tribes until about the year 1887, when the general allotment act was passed; and this condition of wardship of the Indian tribes was generally recognized by the decisions of the Federal Courts made prior to said year. However, we find from an examination of the early treaties with various tribes that Congress had long prior to 1887 clearly indicated that its policy in dealing with the tribes should undergo a radical change. As early as 1862, in a treaty with the Pottawatomie tribe, it was made plain that the theory of guardianship or pupilage should be abandoned, and that the Indians should be equipped with the rights, privileges, and immunities of citizenship, and be prepared for the duties and responsibilities of such status. After providing for assignments of land in severalty, the issuance of certificates and patents, article 3 of said act, among other things, provides:

"And on such patents being issued, and such payments ordered to be made, by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States, and thereafter the lands so patented to them shall be subject to levy, taxation and sale, in like manner with the property of other citizens." (Kappler, vol. 2, p. 825):

Article 1 of the treaty between the United States and the Ottawa Indians, ratified July 16, 1862, and proclaimed July 28, 1862, is as follows:

"The Ottawa Indians of the united bands of Blanchard's Fork and of Roche de Bocuf, having become sufficiently advanced in civilization, and being desirous of becoming citizens of the United States, it is hereby agreed and stipulated that their organization and their relations with the United States as an Indian tribe shall be dissolved and terminated at the expiration of five years from the ratification of this treaty; and from and after that time the said Ottawas, and each and every one of them, shall be deemed and declared to be citizens of the United States, to all intents and purposes, and shall be entitled to all of the rights, privileges and immunities of such citizens, and shall, in all respects, be subject to the laws of the United States, and of the State or States thereof in which they may reside" (Kappler, vol. 2, p. 830).

Article 3, of the treaty with the Kickapoo Indians, ratified March 3, 1863, and proclaimed May 28, 1863, contains the identical provision quoted above from the treaty with the Pottawatomie tribe.

The treaties with practically all of the other tribes, made prior to the general allotment act of 1887, contained provisions for assignment or allotment of lands in severalty; such provisions differing in terms, but all carrying out the new policy adopted by the Government in dealing with such tribes; thus preparing the way for the general allotment act, which contains the following sweeping provision:

"That upon the completion of said allotments, and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.

"And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born

within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property" (Kappler, vol. 1, p. 35).

From this act the Five Civilized Tribes of Indian Territory were expressly excepted; and they are dealt with separately by an act of Congress approved March 3, 1893. In furtherance of the argument that the policy of the Government in dealing with the Indian tribes had changed, reference is here made to section 43 of the act of Congress approved May 2, 1890, which gave to any Indian in Indian Territory the right to make application to the United States Court in said Territory to become a citizen of the United States. (See Kappler's Laws and Treaties, vol. 1, p. 54.)

Said act of Congress of March 3, 1893, above referred to, contains the following provision:

"Sec. 15. The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotment the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotments of the lands held by said tribes, respectively, the reversionary interest of the United States therein shall be relinquished and shall cease.

"SEC. 16. The President shall nominate, and by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee Nation, the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that territory, now held by any and all of such nations or tribes, either by cession of the same, or some part thereof, to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment upon the basis of equity and justice, as may with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union, which shall embrace the lands within said Indian Territory. * * * But said commissioners shall, however, have power to negotiate any and all such agreements as, in view of all the circumstances affecting the subject, shall be found requisite and suitable to such an arrangement of the rights and interests and affairs of such nations, tribes, bands, or Indians, or any of them, to enable the ultimate creation of a Territory of the United States with a view to the admission of the same as a State in the Union" (Kappler, vol. 1, p. 498).

Thus it clearly appears, especially with regard to the members of the Five Civilized Tribes, the Government was anticipating the necessity of creating a State from the Territory occupied by them, and the necessity of preparing said Indians for citizenship in such State.

The importance of these provisions emancipating or leading upon allotment to the emancipation of governmental control of the members of the Five Civilized Tribes and their lands has been fully appreciated by the counsel for the Gov-

ernment, and their argument in the Court of Appeals, which no doubt will be repeated here, is of value.

In the brief filed by the Government in the Court of Appeals, it is said:

"The court below ignores what was presented in our argument below, about the way the allotment and citizenship provision got into the Dawes Commission act, and for this and other reasons we deem it advisable to quote here a part of the stenographic report of that argument:

"The first proposition I desire to state is that the act of 1893, giving consent to the tribes to allot lands, under which allotment citizenship was to take place—that consent being given, as the act shows, to the tribe to allot, is not the basis of these allotments. That policy amounted to nothing. The tribes did not allot, did not want to allot, did not want citizenship, and in the Curtis act of 1898 this idea was seriously abandoned. The Government seized upon the whole body of the tribal lands and provided a uniform system of allotment, which was entirely inconsistent with the permission theretofore given, which permission, besides, was not made use of."

If this argument is sound, it is in effect an admission by the Government that if these tribes had accepted the provisions of the act of 1893, that they became citizens, and the right to maintain these suits is confessedly denied.

Whatever may be the rule applicable to the other tribes of Indians, the Seminole tribe of Indians accepted the provisions of the act of 1893, and were allotted under its provisions, and not under the provisions of the Curtis act of 1898, as stated by counsel.

The Seminole Indians, acting different from the members of the other Five Civilized Tribes, accepted the terms of the act of 1893, and on the 16th day of December, 1897, entered into an agreement and treaty with the Commissioners of the United States, providing for the allotments of their lands. The Curtis act was approved June 28, 1898, and Congress

shows that it was not its intention to abandon the act of 1893 where tribes had accepted its conditions, because on the first day of July, 1898, Congress approved the former treaty made with the Seminoles. To recapitulate: a general act was passed in 1893 providing for the allotment of all the Five Civilized Tribes; the Seminole Indians took advantage of the provisions of that act, and entered into a treaty with the Government on the 16th day of December, 1897. Other tribes of Indians refused to treat with the Government under the provisions of the act of 1893, but Congress having clearly determined to break up the tribal relations, with or without the consent of the Indians, passed the Curtis act of 1898; but this act in no manner affected treaties that had been made prior to that date with the Seminoles, and on the first day of July, 1898, at the same session, Congress confirmed the treaty made with the Seminoles, and the allotments of Seminole Indians were subsequently made under the provisions of the treaty with the Seminoles and under the authority of the act of 1893.

On the 7th day of October, 1899, the Commissioners entered into a supplemental agreement providing for the allotment of certain children born after the making of the former agreement. This supplemental treaty was approved by Congress on June 2, 1900. In this supplemental agreement it is expressly shown and stated that the rolls and allotments should be made pursuant to the act of Congress approved June 28, 1898, and not by the provisions of the Curtis act of 1897, thereby conclusively answering the argument of the Attorney General that the Seminole Indians were not allotted under the provisions of the act of 1893, and if his argument be sound as to the other tribes, which we doubt, the force of this argument is an admission that the Seminole tribe was allotted under the act of 1893, and became citizens of the United States, and the Government, upon the issuance of certificates, lost all control over the lands held by the Seminole Indians in severalty.

To escape the conceded emancipatory provisions of the act of 1893 the Government must insist here as it did in the Court of Appeals that "as to the Seminole Nation the Government contended that *all* lands allotted were inalienable, not having even now been patented, the act of June 28, 1898, section 11, having provided that 'all the lands allotted shall be non-transferable until *full title* is acquired.'"

This argument, however, must fail when it is remembered that the Seminole did not take under this act of 1898, but did take under the act of 1893. But it is also striking to note in this connection that the Government recognizes the right of allottees not of Indian blood of all the other tribes to alienate their lands, though allotted under the act of 1898, which required full title, but denied it to the Seminoles, who were allotted under an act which did not contain the provision. The only restriction upon the Seminole is the provision:

"All contracts for sale, disposition or incumbrance of any part of any allotment made prior to date of patent shall be void."

We will not enlarge this brief by presenting the question of citizenship because it has been fully presented, and we believe the next subdivision of our argument makes that question immaterial.

The Seminole Freedmen have been authorized by Congress to convey.

If Congress has authorized the Freedmen to convey, it, of course, cannot seriously be insisted that the Government has either an interest in the land conveyed or a policy to suspend the operation of the express laws of the United States.

The contention of appellant is that notwithstanding the original prohibition against alienation contained in the agreement with the Seminoles of December 16, 1897, sub-

sequent legislation by Congress gave specific authority to alienate, and this suit seeks to cancel conveyance that Congress has authorized and validated. The provisions controlling in this investigation are as follows:

"All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void."

"When the tribal government shall cease to exist, the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee a deed, conveying to him all the right, title, and interest of the said Nation and the members thereof in and to the land so allotted to him." * * * (Kappler, vol. 1, pp. 63, 64.)

The last-mentioned provision clearly indicates that the patents were due upon a date contemporaneous with the extinguishment of the tribal government. Congress was yet to fix that date, and that was done by section 8 of the Act of Congress approved March 3, 1903, in the following language:

"That the tribal government of the Seminole Nation shall not continue longer than March fourth, nineteen hundred and six: *Provided*, That the Secretary of the Interior shall at the proper time furnish the principal chief with blank deeds, necessary for all conveyances mentioned in the agreement with the Seminole Nation contained in the act of July first, eighteen hundred and ninety-eight, and said principal chief shall execute and deliver said deeds to the Indian allottees as required by said act." (32 Stat. L., 982.)

The next act in point of time affecting titles in the Seminole Nation was the act of Congress approved April 21, 1904, containing the following provision:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized

Tribes of Indians, who are not of Indian blood, except minors, are, except as to homesteads, hereby removed; and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe upon application to the United States Indian agent at the Union agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interests of said allottee." * * * (33 Stats. L., 189.)

Following this was the act of April 26, 1906, entitled, "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes." This act provided as follows:

"SEC. 6. * * * *Provided*, That the principal chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole government ceases to exist."

"SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the lands of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such land by a guardian duly appointed by the proper United States Court for the Indian Territory. * * * All conveyances made under this provision by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

"SEC. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full

blood Indian devising real estate shall be valid if such last will and testament disinherits the parent, wife, spouse or children of such full blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner."

"SEC. 19. * * * *Provided, further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed, but this shall not be held or construed as affecting the validity or invalidity of any such conveyance except as herein above provided."

"SEC. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law." (34 Stat. L., 139, 145, 144, 148.)

From the above quoted acts, both the allottees and purchasers must have understood the intention of Congress to be to remove all obstacles in the way of alienation of their lands by said allottees, as to those not of Indian blood, from and after April 21, 1904, and as to all other citizens of said tribe from and after the 4th of March, 1906, or a reasonable time thereafter. The Executive Department, believing that the laws, with but slight differences, were as to all tribes substantially the same, issued allotment certificates to each of the allottees in the same form. The form used for the Seminole was as follows:

Seminole Roll No. 838. Certificate No. 3312.

CERTIFICATE OF ALLOTMENT.

Seminole Nation.

Commission to the Five Civilized Tribes Wewoka
Land Office.

This certifies has this day been
allotted the following described land, viz.....
containing acres 1st class acres 2nd
class acres 3rd class more or less, as the case
may be, according to the United States survey
thereof.

Total appraised value \$.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
TAMS BIGSBY, *Chairman.*

This certificate is not transferable.

The form used for the Creek is as follows:

Allottee's Roll No. 8789. Selection No. 18435.

CERTIFICATE OF SELECTION.

Commission to the Five Civilized Tribes,
Muskogee Land Office.

Creek Nation.

This certifies that.....has this day filed
his selection of the following described land, viz:

.....
of the Indian base and meridian in Creek Nation
containing.....acres more or less, as the case may
be, according to the United States Survey thereof.

COMMISSION TO THE FIVE CIVILIZED
TRIBES.

TAMS BIGSBY, *Chairman.*

This certificate is not transferable.

After allotment, certificates were issued, and under the provision of the above-quoted provision of the act of March 3, 1903, the Commissioner of Indian Affairs directed the delivery of Seminole patents as follows:

"DEPARTMENT OF THE INTERIOR,
"COMMISSIONER OF THE FIVE CIVILIZED TRIBES.

"Notice.

"Delivery of Deeds to the Citizens and Freedmen of
the Seminole Nation.

"The Secretary of the Interior on May, 1906 (I. T. D.), authorized the Commission to the Five Civilized Tribes to proceed with the delivery of recorded deeds to citizens and freedmen of the Seminole Nation, such delivery to be made by the Commissioner at the Muskogee office upon request of the allottees; and after a reasonable time advertised points throughout the Seminole Nation convenient to the citizens and freedmen.

"Notice is hereby given that the Commissioner will, on Monday, April 15, 1907, begin delivery of deeds to all allottees of the Seminole Nation.

"For this purpose, representatives of the Commissioner will visit the following towns and make a delivery of deeds:

"Tidmore, Monday, April 15.

"Wewoka, Tuesday, Wednesday and Thursday, April 16, 17, 18.

"Sasakwa, Friday and Saturday, April 19 and 20 (1907).

"All persons entitled to receive deeds should be prepared to meet the party at one of the points above advertised upon the dates indicated. From April 15 to April 20, 1907, inclusive, the delivery of the deeds at Muskogee will be suspended and action upon such written request as may be received will be delayed until the return of the field party from the advertised appointments.

"Deeds will be delivered to the head of the family for himself, his wife and minor children.

"Deeds to minor allottees, where legal guardians have been appointed, will be delivered to the guardian upon presentation of letters of guardianship.

"Deeds to deceased allottees will be delivered to administrators upon presentation of letters of administration.

"It will greatly facilitate the work of delivery of the deeds if allottees appearing at their appointments have with them their allotment certificates or furnish their proper roll members.

"The delivery of deeds is without expense to the allottees, and citizens are warned against the payment of any money or other consideration to persons for procuring the delivery of the deeds to which they are lawfully entitled.

"TAMS BIXBY, *Commissioner*."

The act of Congress approved July 1, 1898, ratifying the Seminole treaty contained the following provision:

"All lands belonging to the Seminole tribe of Indians shall be divided into three grades, designated as first, second, and third.....and the SAME SHALL BE DIVIDED AMONG MEMBERS OF THE TRIBE SO THAT EACH SHALL HAVE AN EQUAL SHARE THEREOF in value, so far as may be, the location and fertility of the soil considered, giving to each the right to select his allotment so as to include any improvements thereon owned by him at the time and each allottee shall have the sole right of occupancy of the lands so allotted to him during the existence of the present tribal government and until the members of said tribe shall become citizens of the United States.....and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him."

Undoubtedly when the Seminole citizen had selected his allotment and received his certificate from the Dawes Commission, the land embraced in the allotment certificate was

his property. It had been segregated from the national domain of the Seminole Nation.

Wallace *vs.* Adams, 143 Fed., 721.

Garfield *vs.* Bille Frost, 30 App. D. C., 165.

Jones *vs.* Mehan, 175 U. S., 1.

Prior to this time the tribal authorities had exercised complete control over the lands of the Seminole Nation, leasing them and moving occupants from place to place, a body of Indian police called light horsemen directing by authority of the tribal government the possession of the lands of the Seminole Nation. To stay the hands of the tribal authorities from interfering with his possession during the tribal government, the allottee was given the sole right of occupancy during the existence of the tribal government. Who else was there to interfere with his possession?

To leave no doubt that the intention was to stay the hand of the tribal government, this treaty contains the following clause, ousting the jurisdiction of the Seminole authorities in regard to disputes concerning "the title, ownership, occupation, or use of real estate owned by Seminoles," and conferred same on the United States courts, to wit:

"The United States courts, NOW EXISTING or that may hereafter be created in the Indian Territory, shall have exclusive jurisdiction of all controversies growing out of the TITLE, OWNERSHIP, OCCUPATION, OR USE OF REAL ESTATE OWNED BY THE SEMINOLES."

The object of allotment was to divest tribe of title and vest same in individuals. When individuals came to own this land, very likely there would be conflicting interests concerning the TITLE, OWNERSHIP, OCCUPATION, OR USE OF REAL ESTATE OWNED by various Seminoles, which would give rise to litigation, and jurisdiction of said litigation was given to the United States courts and taken from the tribal courts. If the title and ownership

remained in the tribe, why were these terms used in the treaty?

On March 2, 1906, a joint resolution was approved, which provides:

"SECTION 8. That the tribal government of the Seminole Nation shall not continue longer than March 4, 1906: *Provided*, That the Secretary of the Interior shall at the proper time furnish the principal chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation in the act of July 1, 1898, and said principal chief shall execute and deliver said deeds to the Indian allottees, as required by said act."

On April 26, 1906, another act passed by Congress was approved, which was entitled—

"An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and other purposes."

Section 6 of this act, among other things, provided:

"*Provided*, That the principal chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole government shall cease to exist."

Section 19 of this same act provided:

"That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to selection of allotment and subsequent to removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because conveyances were made prior to issuance and recording or delivery of patent or deed." * * *

This provision applied to other nations as a whole but the Seminole. In other tribes patents were practically all delivered. This smallest of all tribes for some reason alone

did not have patents. Nor can it be contended that the phrase, "members of any of the Five Civilized Tribes," did not embrace the Seminole, because the act in its title used the words "Five Civilized Tribes," and many of its sections referred alone to the Seminole.

The necessity of section 19 was created because by the act approved April 21, 1904, was removed all of the restrictions from the surplus allotments of the freedmen and intermarried whites. It was as follows:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians, who are not of Indian blood, except minors, are, except as to homesteads, hereby removed; and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may with the approval of the Secretary of Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe upon application to the United States Indian Agent, at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee * * *."

Considering all these acts, it is clear that persons, Seminole allottees, not of Indian blood, such as freedmen, may alienate this surplus allotment, and the bill does not state equity in the following particulars:

First. The bills are defective in not showing that the allottees whose conveyances are sought to be canceled herein are among that class, if there be such, from whom the law has not removed the restrictions upon alienation. The acts of Congress heretofore referred to in plain terms removed the restrictions from certain classes, if not all Seminole allottees, and the bills fail to show that the allottees for whom relief is sought are not among such classes.

Second. The complainant is not entitled to the relief for which it prays, for the reason that Congress has removed the restrictions upon alienation, and the allottees had the right to make the conveyances sought to be canceled, and they are legal and valid.

For convenience, the conveyances sought to be canceled may be classified as follows:

1. Those made by citizens not of Indian blood, subsequent to April 21, 1904.
2. Those made by all other allottees, subsequent to March 4, 1906.

As to the first of these classes of conveyances, appellees contend that the section above quoted from the act of April 21, 1904, forever sets at rest the question of the validity of those conveyances. That act was passed for a purpose; the meaning is clear; the statement is directly to the point: when it provided "ALL the restrictions" were removed; it meant every restriction there existed against the alienation of lands of a certain class of allottees of the Five Civilized Tribes. As to the other nations, there may have been several obstacles in the way of alienation. With the Seminoles, there was but one, that which said that all contracts for sale, disposition or encumbrance of any part of any allotment made prior to the date of patent should be void. If all the restrictions were removed, this particular one most certainly was. The restrictions were removed from the "ALIENATION" of the lands, meaning that they could be conveyed by that certain class of allottees, either by long-term lease, mortgage, or deed. All restrictions were removed upon the alienation of the lands of allottees of either of the FIVE Civilized Tribes. The act, if applicable to any of these tribes, was applicable to the Seminole tribe; otherwise it would not have applied to five tribes, but to four, or some less number. What was the intention of Congress at the time this act was passed?

Would it not have been a very easy matter to have excepted the Seminole tribe from the operation of the act, if such had been the intention? We are not required to put a forced construction upon a statute, and we submit most earnestly that to place any other construction upon this one would be a forced and unnatural construction. What did the act mean to the allottees, who were to convey, and the purchasers who bought from them?

This act further provided that the Secretary of the Interior might remove all restrictions upon the alienation of the lands of all other allottees (those of Indian blood), except minors and except as to homesteads, under such rules and regulations as he might prescribe. Will the complainant contend that the Honorable Secretary of the Interior had no authority to remove restrictions under this act? If he had authority, did it not apply to the Seminole Nation, the same as the other nations of the Five Civilized Tribes? The complainant will admit that the Secretary of the Interior, acting under the authority conferred by this very provision of law, has removed restrictions from Seminole allottees of Indian blood.

If there was ever any question about the restrictions being removed from the surplus lands of adults not of Indian blood, and the validity of the conveyances made by them to the defendants herein, that question is undoubtedly settled by section 19 of the act of April 26, 1906, which provided:

"That conveyances heretofore made by members of any of the Five Civilized Tribes, subsequent to the selection of allotment, and subsequent to removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed. * * * "

What was the object of this section, if not to settle just the question that had arisen in regard to conveyances in the Seminole and other nations, where patents had not as yet

issued? This act was also plain and direct, unmistakable in its terms, and had for its sole purpose the settlement of the question as to the validity of conveyances made subsequent to the selection of allotment and subsequent to the removal of restrictions, but before delivery by patent.

Will the complainant contend that as to this class of allottees, and the conveyances made by them, it has any obligations to discharge to the public, any obligations to the individual allottees, or any interest of its own, that will enable it to sustain these suits? Our contention is that the Government never had any interest from any viewpoint sufficient to enable it to maintain these actions, but if it should be held otherwise, it seems to us conclusive that such interest ceased to exist upon the passage of this act.

This bill does not involve conveyances by allottees of Indian blood and we will not enter into a discussion of this class.

From a review of the treaty and the acts of Congress above referred to we deduce the two following propositions:

First. That the various treaties and acts of Congress and the full compliance therewith by the allottees vested in all of said allottees the complete equitable title to their allotments.

Second. That if it be deemed essential that the patent must be issued in order to enable the allottee to make a valid conveyance, the time for the issuance of such patents being fixed as the 4th of March, 1906, the contention of defendants is that in law the patents will be deemed to have been delivered as of that date, or within reasonable time thereafter.

In support of the first of these propositions, the Supreme Court of the United States, in the case of *Stark vs. Starr*, 6 Wall., 925, very clearly states the rule to be that a right to a patent, once vested, is treated by the Government, when

dealing with the public lands, as equivalent to a patent issued.

In *Barney vs. Dolph*, 97 U. S., 652; 24 L. Ed., 1063, the rule stated in *Stark vs. Starr* is approved, and Chief Justice Waite uses the following language:

"When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the Government was concerned, to a patent actually issued. So we decided in *Stark vs. Starr*, *supra*. The execution and delivery of the patent, after the right to it is complete, are the mere ministerial acts of the officer charged with that duty. An authorized sale by a settler, therefore, after his right to a patent had been fully secured, was, as to the Government, a transfer of the ownership of the land."

Later on in the same opinion it was said:

"After this prohibition was taken away, the system was radically changed, and a perfected right to a patent was made as good as the patent itself for all purposes except the mere convenience of proving title."

Judge Sanborn, in *Wallace vs. Adams*, 143 Fed., 716, speaking for the Circuit Court of Appeals of this circuit, says:

"The allotment certificate, when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal empowered to decide the question, that the party to whom it issues, is entitled to the land, and it is a conveyance of the right to this title to the allottee."

Godfrey vs. Iowa Land & Trust Co., 95 Pac., 792.

De Graffenreid vs. Iowa Land & Tr. Co., 95 Pac., 624.

McWilliams Investment Co. vs. Livingston et al., 98 Pac., 614.

Jones vs. Mehan, 175 U. S., 1; 20 Sup. Ct. Rep., 1.

Flanagan vs. Forsythe, 6 Okla., 225.

Oliver vs. Forbes, 17 Kas., 130.

Black vs. Jackson, 177 U. S., 360; 20 Sup. Ct. Rep., 648.

It has been uniformly held that an Indian may convey his land, unless a conveyance is prohibited, after the communal relation is broken up.

Jones *vs.* Mehan, 175 U. S., 1.

Oliver *vs.* Forbes, 17 Kan., 113.

Briggs *vs.* Washukqua *et al.*, 37 Fed., 135.

New York Indians *vs.* United States, 170 U. S., 1.

In the case of New York Indians *vs.* United States, *supra*, is found an extended discussion of Indian titles, and it is there held that if lands are set apart to a tribe of Indians or to members thereof, that they take the lands in fee whether a patent has been issued by the President or not.

In Oliver *vs.* Forbes, *supra*, the Supreme Court of Kansas says:

"If the patent is valid, it is merely because it is in confirmation with the pre-existing rights and not because it created any new rights, and every right existing at the time it was issued, existed at the time and before (the heirs) executed the first deed to Oliver. From the time the heir executed said deed to Oliver until said patent was issued, nothing transpired to give her any greater rights, powers or privileges than she previously possessed. If such patent was legally and rightfully issued, then it should have been issued at the latest, as early as 1868, at the time when the treaty of 1867 took effect, which was before Mary Bostick (the heir) executed the deed to Oliver; and it is a general rule of law, that when a patent is issued it relates back to the earliest moment when it ought to have been issued. * * * Now, John Riley, the deceased allottee, in his lifetime had the EQUITABLE TITLE to said land; and his certificate of allotment was sufficient evidence thereof. When he died, his wife succeeded to the estate by inheritance and not by purchase. It is not material which, so far as this case is concerned. In either case, his widow was restricted in the sale of the land, or she was not restricted. If she was restricted, then her first deed to Forbes was void. But if she was not restricted, then her first deed was valid. In any case,

therefore, the defendant, Forbes, must be defeated.
 * * * because such restrictions imposed by the treaty of 1861 were merely personal to their original allottees or because such restrictions were in the present case removed by the death of the allottee and by the provisions of the treaty of 1867. Nothing else transpired to remove them."

In the case of *Briggs vs. Washukqua*, *supra*, Judge Foster, stating the right of an Indian to convey without a patent, says:

"From and after said act of 1886 became a law, the Government held the legal title in trust, for the heirs of all such allottees then deceased. The right to the patent was absolute and complete, and the duty of the secretary to issue the patent was imperative (then citing the opinion of Mr. Justice Field in *Stark vs. Starrs*, 6 Wall, 418). If the patent relates back to the inception of the right to it, to cut off intervening claimants, with equal right and justice it must relate back to estop the patentee from asserting title against his grantee under warranty deed made before the patent actually issued, and after his right to it had become absolute. (Then cites *Langdean vs. Hanes*, 21 Wall., 530.)

"I can see nothing in the language or purpose of the act of 1886 to warrant the construction claimed for it by counsel for defendants, that the heir takes the land with the same restrictions and limitations upon the right to sell as existed against the allottee in his lifetime. The patent is absolute and unconditional, a fee simple. The whole title of the Government passes to the allottee and his heirs for all purposes and without restrictions."

Patent has never been necessary in order to permit the equitable owner to convey his land.

Flannigan vs. Forsythe, 6 Okla., 145.

McLenge vs. Penny, 12 Okla., 303.

Stork vs. Duvall, 7 Okla., 213.

Johnson vs. Borin, 7 Kan., 369.

In the case of *Black vs. Jackson*, 177 U. S., 360, the Supreme Court of the United States approves the principles stated in *Flannigan vs. Forsythe*, *supra*.

In the case of *Brun vs. Marn*, 151 Fed., 145, in a well considered opinion, Circuit Judge Sanborn, in the Circuit Court of Appeals of this circuit, approved the principles in the case of *Flannigan vs. Forsythe*.

Instead of its being the settled policy of the Government to require patents to issue prior to permitting a conveyance, we contend that it has been the settled policy of the Government to permit a sale without reference to whether final patent has issued. An examination of any and all of the acts removing the restrictions imposed by the General Allotment Act of 1887, will disclose that none of the acts removing such restrictions have ever required patents to issue. In the Indian Appropriation Act approved August 28, 1904, is found a provision permitting the Citizens Band of Pottawatomie Indians and the Absent Shawnee Indians to convey. This act reads as follows:

"That any member of the Citizens Band of Pottawatomie Indians and of the absentee Shawnee Indians of Oklahoma to whom a trust patent has been issued under the provisions of the act approved Feb. 8, 1887 (24th Statutes, 388), and being over twenty-one years of age, may sell or convey any portion of their land covered by such patent in excess of eighty acres, the deed of conveyance to be subject to the approval by the Secretary of the Interior, under such rules and regulations as he may prescribe and that any citizen Pottawatomie Indian, not residing upon his allotment, but being a legal resident of another State or Territory, may in like manner sell and convey all of the land covered by said patent and that upon the approval of such deed by the Secretary of the Interior the title to the land thereby conveyed shall vest in the grantee therein named. And the land sold and conveyed under the provisions of this act shall upon proper recording of the deeds therefor be subject to taxation as other lands in said territory,

but neither the lands covered by such patents in said territory nor any improvements made thereon shall be subject to taxation by any territorial or local authorities during the period in which said lands shall be held in trust by the United States."

This section was amended by section 7 of the Indian Appropriation Act of May 21, 1900, allowing other conveyances to be made and in the amendment no provisions were made for the issuance of any patent.

The act of June 21, 1906, providing for the removal of restrictions from non-resident Kickapoo Indians, contained no provisions requiring patent to issue.

Section 7 of the Indian Appropriation Act, approved May 2, 1902, purports to be an act to remove restrictions generally upon inherited Indian lands. This act applies to all tribes of Indians, and shows that it is not necessary that a final patent shall issue in order to enable the allotted lands to be alienated.

In the case of *Doe vs. Wilson*, 23 Howard, 457; 16 L. Ed., 584, it is said:

"Although alone, the Government can purchase lands from an Indian Nation, it doesn't follow that when the rights of an Indian are extinguished, an individual of the nation who takes as private owner cannot sell his interest. The Indian title is property, and alienable unless the treaty has prohibited its sale."

The above quotation was quoted with approval by the Supreme Court of the United States in the recent case of *Jones vs. Meehan*, 175 U. S., page 16.

We also quote further from the opinion of the court in the case of *Jones vs. Meehan*, page 21:

"The clear result of this series of decisions is that when the United States in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States,

makes a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation unless accompanied by words limiting its effect is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure unless the United States by a provision of the treaty or act of Congress have expressly or impliedly prohibited or restricted its alienation."

In the case of *Quinney vs. Denney*, 18 Wis., 510, there was involved the validity of a conveyance made an allottee of the Stockbridge tribe of Indians who had not received his patent. It was claimed that he was without authority to alienate. The Supreme Court of Wisconsin speaking through Cole, judge, uses the following language:

"Now, we are of the opinion that this act created or gave to the allottee an equitable estate or title in the land allotted to him, which could be sold or transferred by deed and that when the patent subsequently issued to him, it enured to the benefit of his grantee.

"We think that this position is abundantly sustained by the following authorities cited in the brief of the counsel for the appellant: *Strother vs. Lewis*, 12 Peters, 410; *Stoddard vs. Chambers*, 2 How. (U. S.), 284; *Grignon vs. Astor*, *id.*, 319; *Lee Bois vs. Bramell*, 4 *id.*, 439; *March vs. Brooks*, 8 *id.*, 223; *Leandes vs. Brant*, 10 *id.*, 348; *United States vs. Brooks*, *id.*, 442; *French vs. Spencer*, 21 *id.*, 228; *Berthold vs. McDonald*, 22 *id.*, 334; *Doe vs. Wilson*, 23 *id.*, 458; *Crews vs. Burcham*, 1 Black, 352; *Cgallefoux vs. Durcharme*, 4 Wis., 554.

"*Doe vs. Wilson* and *Cress vs. Burcham*, involve questions of law and fact quite analogous to those arising upon this record; and when the provisions of this treaty are considered (see treaty with the Pottawatomie, Oct. 27, 1832, 7 U. S. Stat. at Large, Indian Treaties, page 399), under which these cases

arose, they will be found to be very strong authorities in support of the conclusion already announced. And the position that the allottee took under the act of March 3d, 1843, an equitable title to the land allotted to him is likewise strongly fortified by the preamble to the treaty made with the Stockbridge Tribe of Indians, November 24th, 1848 (U. S. Stat. at Large, p. 955), and by the 14th article of the subsequent treaty with the same tribe, February 5th, 1856" (11 U. S. Stat. at Large, pp. 663-666).

See also

Ruggles vs. Marlissiot, 19 Wis., 159.

The proposition that an allottee may convey his land when he has selected an allotment, unless he is prohibited from doing so by positive provisions of law, is so well established that we merely call the court's attention to the cases establishing this rule:

Marsh vs. Brooks, 8 How., 223.

French vs. Spencer, 62 U. S., 228; L. Ed., 16-97.

Crews vs. Burcham, 17 L. Ed., 91; 1 Black, 352.

Stark vs. Starr, 6 Wall., 402.

Lamb vs. Davenport, 18 Wall., 307.

Ryan vs. Carter, 93 U. S., 78.

Elwood vs. Flannagan, 104 U. S., 562.

Briggs vs. Washpukqua, 37 Fed., 135.

United States vs. Winona, etc., Ry. Co., 67 Fed., 948.

James vs. Germania Iron Co., 107 Fed., 597.

Wallace vs. Adams, 143 Fed., 716.

Langdeau vs. Hanes, 21 Wall., 521.

Oliver vs. Forbes, 17 Kan., 113.

Clark vs. Lord, 20 Kan., 390.

Jones vs. Meehan, 173 U. S., 1.

Best vs. Doe, 18 Wall., 112.

United States vs. Brooks, 10 How., 442.

Dole vs. Wilson, 20 Minn., 356.

Francis vs. Francis, 99 N. W., 14.

An allottee upon the selection of his allotment, has the full equitable title thereto and may make a valid conveyance thereof and when the legal title passes to him, it immediately vests in his grantee. See the cases last above cited, also the following cases:

- Mitchell *vs.* U. S., 15 Pet., 52.
 Jones, Admr., *vs.* Green's, Admr., 41 Ark., 363.
 Kline *vs.* Ragland, 47 Ark., 117.
 Steeple *vs.* Downing, 61 Ind., 478.
 Clark *vs.* Hall, 19 Mich., 356.
 Fisher *vs.* Halleck, 15 N. W., 552.
 Douglass *vs.* McCoy, 5 Ohio, 522.
 Bernardz *vs.* Colonial Land Co., 98 N. W., 166.
 Baldwin *vs.* Root, 40 S. W., p. 3.
 Barr *vs.* Gratz, 4 L. Ed., 553.
 Bush *vs.* Marshall, 6 How., 284.
 French *vs.* Spencer, 62 U. S., 228.
 Massey *vs.* Papin, 24 How., 362.
 Stanway *vs.* Rubbio, 51 Cal., 41.
 Nicodemus *vs.* Young, 67 N. W., 906.
 Johnson *vs.* Newman, 53 Tex., 628.
 Morrison *vs.* Faulkner, 21 S. W., 984.
 Spice *vs.* Newberg, 37 N. W., 417.
 Dunn *vs.* Barnum, 51 Fed., 355.
 Jenkins *vs.* Collard, Law Ed., book 36, p. 82.
 Godfrey *vs.* Iowa Land & Trust Co., 95 Pac., 792.
 McWilliams Inv. Co. *vs.* Livingston, 98 Pac., 914.

The repealing of the restriction against alienation was equivalent to the allotment without restriction, and from the above cited cases an Indian as well as other persons may convey his interest in lands when unrestricted and upon the issuance of patent the legal title passes to his grantee.

The provision as to the conveyances of mixed-blood heirs of inherited lands, made subsequent to the passage of the

act of April 26, 1906, which in express terms gave them the right to alienate lands inherited by them from deceased allottees, reads as follows:

"SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued, for his or her share of the lands of the tribe to which he or she belonged or belongs, may sell and convey the land inherited from such decedent, and if there be both adult and minor heirs of such decedent, then such minors may join in the sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory, and in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe" (34 Stat. L., 145).

This provision seems clear as to the authority of mixed-blood heirs to convey their inherited lands. It must apply to the Seminole Nation. It not only refers to the Five Civilized Tribes, in order to constitute which the Seminole Tribe must be considered, but further provides that the heirs of any deceased Indian "whose selection has been made or to whom a deed or patent has been issued" may sell and convey the lands inherited from such decedent. The bill of the complainant herein alleges that the lands described therein have been allotted, and this complies with the only requirement of the statute above quoted. This section, taken in connection with section 19 of the same act, fortifies the position that for the purpose of conveyance, both before and after the passage of this act, patent was unnecessary.

The case of *Barney vs. Dolph*, *supra*, was a case involving the public lands of the United States and not Indian lands, but in *Ballinger vs. United States*, 216 U. S., 240, in an opinion by the late eminent justice from the eighth circuit, who had during a long judicial career been most intimate with the Indian legislation, the principles of *Barney vs. Dolph* were applied to the construction of the Indian treaties.

It was there said:

"It must be borne in mind that this allotment provided by Congress contemplated a distribution among the Choctaw and Chickasaw Indians of the lands that belonged to them in common."

The lands belonged to Indian tribes and was duly distributed to the members by those several allotment acts.

The court then applies the rule of *Barney vs. Dolph*, *supra*, as follows:

"But the authorities come more closely to the facts in this case. In *Barney vs. Dolph*, 97 U. S., 652, 656, Mr. Chief Justice Waite said:

"The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty.'"

In the case of *Godfrey vs. Iowa Land and Trust Co.*, — Okla., —, the Chief Justice, speaking for that court, construed all the provisions of law relating to the Seminole Nation, and held that the act of April 21, 1904, authorized a citizen not of Indian blood to convey his surplus allotment. While this decision is by a court not possessing the right to finally decide this question, the able, elaborate, and convincing reasoning of that court has been accepted by the Federal courts of that State as settling the question beyond controversy.

This principle has been recognized by the Department repeatedly. In the treaty of December 16, 1897, it was provided:

"The townsite of Wewoka shall be controlled and disposed of according to the provisions of an act of the General Council of the Seminole Nation approved April 23, 1897, relative thereto; and upon the extinguishment of the tribal government deeds of conveyance shall issue to owners of lots as herein provided for allottees," etc.

These lots are yet undecided, but the Government has not claimed that the same cannot be transferred. In fact a prosperous city has been built on this townsite, the property transferred mortgaged, taxed, and otherwise it has been recognized that the fee of the property is vested in the respective owners. Among other things, the act of April 21, 1904, provided:

"All restriction upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed; and all restrictions upon the alienation of all other allottees of said tribes, except minors and except as to homesteads, may with the approval of the Secretary of the Interior be removed," etc.

The Secretary has removed a number of the restrictions of Seminole allottees of Indian blood. Can the first provision, which removes the restriction of allottees not of Indian blood, be given less force than the latter, which removes the restrictions on allottees of Indian blood?

We believe this court can reach no other conclusion than that freedmen may convey their surplus allotment under the act of 1904. The protection of the Indian requires that the doubt should be removed from his right to convey, so that the purchaser feeling secure in his investment will pay

the reasonable value of this land, and the allottee will find a stable competitive market for his property. The uncertainty injures the allottee and ought to be put at rest by the decision of this court.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

ALFRED F. GOAT ET AL., APPELLANTS,

v.

THE UNITED STATES.

} No. 405.

THE DEMING INVESTMENT COMPANY,
appellant,

v.

THE UNITED STATES.

} No. 434.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT OF THE UNITED STATES ON THE
SPECIAL QUESTION OF ALIENABILITY OF LANDS IN-
VOLVED IN THESE SUITS.

STATEMENT.

This brief is supplemental to the brief filed by the Government on the three general questions passed upon by the Circuit Court and the Circuit Court of Appeals: (1) Capacity of the United States to sue; (2) defect of parties; (3) multi-

farioussness, and is directed solely to a discussion of the special questions of alienability of the lands involved in the bills at the date of the execution of the conveyances complained of therein. These two cases appealed involve lands allotted to members of the Seminole Tribe of Indians and are considered together, and the one brief on the special question of alienability filed because it is the contention of the Government that all instruments affecting all lands allotted to members of the Seminole Tribe of Indians are void because made prior to the date of patent, under the provisions of an act of Congress approved July 1, 1898 (30 Stat., 567), without regard to the class of members, whether Indian or freedmen or the quantum of blood.

The United States as complainant has heretofore filed 38 bills seeking to have canceled attempted conveyances to the number of 3,313, all involving lands of the members of the Seminole Tribe. In each bill are grouped all conveyances covering the lands belonging to a certain class. There are six of these classes designated for the Seminole bills. In the case of *The Deming Investment Co. v. The United States* are involved conveyances by others than allottees of lands allotted to Seminole Indians of various degrees of blood, some living, some deceased, and to freedmen members of the Seminole Tribe. In the case of *Alfred F. Goat et al. v. The United States* are involved conveyances by freedmen members of the Seminole Tribe of lands in-

cluding homesteads allotted to them. In the printed record it happens that the transactions set out include only lands allotted other than homestead, but other transactions complained of in the bill, omitted from the printed record for the sake of brevity, include lands allotted as homesteads as well. In the first case mentioned are involved 217 conveyances and 146 defendants, and in the *Goat* case 46 conveyances and 44 defendants of the special class designated for each bill. In the circuit Court of Appeals is pending one other bill in which are included 10 conveyances and 11 grantees named as defendants, and in the Circuit Court seven other bills, involving 792 conveyances and 481 different defendants of the class of conveyances in the *Deming Investment Co.* case, and in the Circuit Court nine other bills involving 1,020 other instruments and 631 defendants, all of the class assigned to the bill of complaint in the *Goat* case. In each of the instruments complained of in the *Deming Investment Co.* case the grantor is not the allottee of the land included therein, and in the *Goat* case the grantor in each instrument sought to be canceled is a freedman member of the Seminole Tribe and the lands involved were allotted to him.

The third paragraphs in the bills of complaint in each case are identical in language and allege that Congress, by an act approved July 1, 1898 (30 Stat., 567), provided that all contracts for sale, disposition, or encumbrance of any part of any

allotment of a member of the Seminole Tribe of Indians made *prior to the date of patent* shall be void.

The fourth paragraph in the *Deming Investment Co.* case alleges (R., 6 and 7) that at the date of the execution of the instruments complained of none of the lands included therein had been patented to the individual allottees; that the grantors in said transactions were not the allottees; that all contracts for the sale or disposition of any of said allotments prior to the date of patent were expressly declared to be void; and that other laws of Congress imposed further restrictions upon the transfer and encumbrance of the lands involved belonging to the particular class of tribal members mentioned, in addition to those arising from the absence of patent.

The fourth paragraph of the bill of complaint in the *Goat* case alleges (R., 4) that at the time of the transactions of sale or encumbrance complained of in the bill of complaint the lands involved were allotted to freedmen members of the Seminole Tribe of Indians and none had been patented to the individual, and that all the instruments affecting the said lands were therefore void.

The Circuit Court, having sustained the demurrers to the bills on other grounds, did not pass upon the special questions of alienability, and this was assigned as error in the appeal to the Circuit Court of Appeals. (16th assignment of error, *Deming Investment Co.* case, R., 53, and 16th assignment of error, *Goat* case, R., 42.)

The Circuit Court of Appeals, reversing the decrees of the trial court, passed upon only such questions as were considered by the Circuit Court.

If it is determined that no lands allotted to members of the Seminole tribe of Indians are alienable before patent to the individual, then all the instruments included in the two cases on appeal as well as all other instruments affecting allotted lands in the Seminole Nation are void and their invalidity established irrespective of restrictions on lands allotted to members of the Five Civilized Tribes imposed by other acts of Congress. And, although the main contention of the Government is that all instruments affecting lands of the members of the Seminole Tribe of Indians are void under the provisions of the act of Congress approved July 1, 1898, declaring them void because the individual members had not received their patents, the acts of Congress imposing and removing restrictions upon lands allotted to members of the Five Civilized Tribes generally will be discussed in the argument.

In this brief will be set out:

I. The portions of treaties and acts of Congress necessary to the full discussion of the question of alienability of the lands involved.

II. The argument for the Government, in which it is contended that not only were the conveyances complained of, at the date of their execution, taken by the appellants in violation of the provisions of the treaties and acts of Congress imposing restrictions upon the lands included therein, but also that

the class of lands involved has always been and is restricted as to its alienation:

A. Because no patent to any of the lands has been delivered; and

B. Acts of Congress imposing restrictions generally upon lands allotted to members of the Five Civilized Tribes prohibited the alienation of lands of some of the particular classes of Seminole Indians mentioned in the two classes of cases under consideration and were and still are in full force and effect, and as to the lands of other particular classes of Seminole Indians were in full force and effect at the date of the execution of the instruments complained of.

I.

TREATIES AND ACTS OF CONGRESS APPLICABLE.

The Seminole agreement of December 16, 1897, approved July 1, 1898 (30 Stat., 567), makes provision for the division of all lands belonging to the Seminole Tribe of Indians among the members of the tribe and restricts their alienation as follows:

All lands belonging to the Seminole tribe of Indians shall be divided into three classes, designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents, and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and

fertility of the soil considered; giving to each the right to select his allotment so as to include any improvements thereon owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him during the existence of the present tribal government, and until the members of said tribe shall have become citizens of the United States. Such allotments shall be made under the direction and supervision of the Commission to the Five Civilized Tribes in connection with a representative appointed by the tribal government; and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him.

All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void.

* * * * *

When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the

allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity.

Section 8 of the act of March 3, 1903 (32 Stat., 982, 1008), provides:

That the tribal government of the Seminole Nation shall not continue longer than March fourth, nineteen hundred and six: *Provided*, That the Secretary of the Interior shall at the proper time furnish the principal chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation contained in the act of July first, eighteen hundred and ninety-eight (30 Stat. p. 567), and said principal chief shall execute and deliver said deeds to the Indian allottees as required by said act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee until further legislation by Congress, and such records shall have like effect as other public records: *Provided further*, That the homestead referred to in said act shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment.

A separate deed shall be issued for said homestead, and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof.

The joint resolution of March 2, 1906 (34 Stat., 822), provides:

That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

Section 6 of of the act of April 26, 1906 (34 Stat., 137, 139), provides:

That if the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States, or if any such executive become permanently disabled, the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability or death of the incumbent, by appointment of a citizen by blood of the tribe.

If any such executive shall fail, refuse or neglect, for thirty days after notice that any instrument is ready for his signature, to appear at a place to be designated by the Secre-

tary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded shall convey legal title, and such approval shall be conclusive evidence that such executive or chief refused or neglected after notice to execute such instrument.

Provided, That the principal chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole government shall cease to exist.

Section 28 of the act of April 26, 1906 (34 Stat., 137, 148), provides as follows:

That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law * * *.

II.

ARGUMENT.

ALL THE TRANSACTIONS SET OUT IN THE BILLS OF COMPLAINT WERE VOID BECAUSE HAD IN VIOLATION OF ACTS OF CONGRESS PROHIBITING THE ALIENATION OF THE LANDS INCLUDED IN THE ATTEMPTED CONVEYANCES.

A. Because no patent to any of the lands has been delivered.

Much emphasis has been placed by the appellants on their statement that the Seminole Nation, prior to allotment, was the absolute owner of its domain

in fee simple under the provisions of so-called treaties between it and the United States. It matters not, under the allegations of the bills in these cases, what kind of title the *tribe* had. It is necessary, therefore, to consider only what restrictions the Government and the tribe saw fit to impose upon the alienation of the lands when allotted to the members of the tribe. These restriction provisions are found in the acts of Congress growing out of the agreements or so-called treaties with the Seminoles had in pursuance of the policy of the Government in breaking up the tribal relations by the apportionment of the lands and other property of the tribe among the individual members thereof.

The Seminole agreement of December 16, 1897, approved July 1, 1898 (30 Stat., 567), is the first necessary to be considered in this connection. Under its terms each allottee was given "the sole right of occupancy of the land so allotted to him, during the existence of the present tribal government," and a *certificate* describing his portion of the land was to be delivered to him. All contracts for sale, disposition, or encumbrance of any part of his allotment made *prior to date of patent* are declared to be *void*. Not until the tribal government shall cease to exist shall a patent, executed by the principal chief last elected, be delivered to the allottee who had the *right of occupancy* of the land described therein. It was provided that this patent should convey to the allottee all the right, title, and interest of the Seminole Tribe and its members in

and to the land so allotted, and the approval of the deed by the Secretary of the Interior should operate as relinquishment of the right, title, and interest of the United States in and to that land and as a guarantee by the United States of the title thereto to the allottee. By this agreement, too, the allottee should designate 40 acres which should, by the terms of the deed, be made inalienable and non-taxable as a homestead in perpetuity. (Seminole agreement, *supra*.) Certainly the intention of Congress could not be more plainly stated, and the appellants can not find any ambiguity of language in this original act with which to construe into validity their illegal transactions with these Indians. This agreement with the Seminoles, an early one, differs from like provisions in the original agreements with the Creeks, Cherokees, Choctaws, and Chickasaws.

Section 23 of the Creek agreement of March 1, 1901 (31 Stat., 861, 867), is typical of like provisions found in the agreements with the Cherokees, Choctaws, and Chickasaws, and reads as follows:

Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and

interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

This provision is very different from the one in the Seminole agreement making provision for the execution and delivery of the deeds to the allottee in that in the other four tribes the deeds were to be delivered immediately upon completion of allotments. In the Seminole Nation the execution and delivery of the deeds to the allottees was postponed until the tribal government ceased to exist.

There is this difference, too, between the provisions of the first agreements as to the time when the land allotted to the individual Indian of the Seminole Tribe on the one hand and of all the other four tribes on the other could be alienated. The allotted lands in the Creek, Cherokee, Choctaw, and Chickasaw Nations were to be inalienable for specified periods. In the Seminole agreement only the sole right of occupancy during the existence of the tribal government was granted to the allottee, and all contracts for the sale, disposition, or encumbrance of any part of his allotment made prior to the date of patent, which was to be delivered when the tribal government ceased to exist, were declared to be void, and there were no provisions incorporated in the agreement for restrictions upon alienation after the issuance of the deeds to the allottees.

The first agreement with the Creeks, approved March 1, 1901 (31 Stat., 861), prohibited alienation

of lands allotted to members of the tribe before the expiration of five years from the ratification of the agreement, except with the approval of the Secretary of the Interior, and made that portion selected as a homestead nontaxable and inalienable for 21 years.

The Cherokee agreement, approved July 1, 1902 (32 Stat., 716), made inalienable the homestead during the lifetime of the allottee, not exceeding 21 years from the date of the certificate of allotment, forbade (sec. 14) alienation of lands allotted to citizens by the allottee or his heirs before the expiration of 5 years from the date of the ratification of the act, but permitted (sec. 15) all lands allotted, other than homestead, to be alienated in 5 years after issuance of patent.

The agreement with the Choctaws and Chickasaws, called the Atoka agreement and incorporated in the act of June 28, 1898 (30 Stat., 495), made inalienable the homestead allotted to members of those tribes for 21 years from date of patent and permitted members to alienate their other lands, one-fourth in 1 year, one-fourth in 3 years, and the balance of the alienable lands in 5 years from the date of patent. The difference between the terms used in imposing restrictions in the Seminole agreement and each of the other agreements is readily noted. To the members of the Seminole Tribe the sole *right of occupancy only* is given to lands allotted to each with no permission to con-

tract for sale, disposition, or encumbrance *prior to date of patent*.

The Government contends that none of the lands in the Seminole Nation have yet passed to the members so as to be alienable. No provision has been made for the disposition of a "sole right of occupancy," but it is expressly declared that all contracts respecting the disposition of the land occupied, prior to the date of patent, shall be void. The occupant has the use of the land during the existence of the tribal government and when the tribal government ceases to exist he shall get a deed to the land occupied by him, executed by the principal chief last elected and approved by the Secretary of the Interior.

These provisions in the Seminole agreement have not been repealed, the Seminole tribal government has not yet ceased to exist, and the lands allotted to members of the tribe have not yet been patented.

Section 8 of the act of March 3, 1903 (32 Stat., 982, quoted *supra*), provided that the tribal government of the Seminole Nation should not continue longer than March 4, 1906, that at the proper time the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances mentioned in the agreement, and that the principal chief shall execute the deeds and deliver them to the allottees. A further provision in the same section makes inalienable the homestead during the lifetime of the allottee, not ex-

ceeding 21 years from the date of the deed. And here the appellants contend that the officers of the Government failed to do their duty—to issue patents to the Seminole allottees on March 4, 1906, or within a reasonable time thereafter—and claim vested rights, this contention, notwithstanding a joint resolution of March 2, 1906 (34 Stat., 822), passed two days before the time set in the act of March 3, 1903, for the extinguishment of the tribal government, continuing in full force and effect the tribal existence and tribal government of each of the Five Civilized Tribes by name, *for all purposes* under existing laws, until all property of the tribes shall be distributed among the individual members and notwithstanding, too, the act of April 26, 1906 (sec. 28), continuing in full force and effect *for all purposes* authorized by law the tribal existence and tribal government of the Seminole Tribe of Indians.

It is true the proviso in section 6 of the act of April 26, 1906 (*supra*), *authorizes* the principal chief of the Seminole Nation to execute deeds to allottees prior to the time when the Seminole government shall cease to exist, but he is not *commanded* so to do. This wording is an indication that the matter is left to his sound discretion—to determine the proper time—and that he has not abused his discretion is evident from the fact that his failure to execute the deeds has not resulted in the deeds being approved by the Secretary of the

Interior without such execution, as is permitted by other provisions of this section. If this action had been had by the Secretary of the Interior, and the deed, when so approved, recorded, legal title would have been conveyed. (Sec. 6, act of Apr. 26, 1906, *supra*.)

No definite time is fixed for the delivery of the real alienable or fee title to the allottee, and that the proper time has not yet arrived is evident from the nonaction of the tribal authorities and the Secretary of the Interior. The Seminole agreement postponed the execution and delivery of patents until the tribal government should cease to exist; the act of March 3, 1903, fixed the date of its termination as March 4, 1906; the joint resolution of March 2, 1906, and the act of April 26, 1906, continued its existence indefinitely. By the terms of the last act authority was given the principal chief to execute the deeds prior to the termination of the tribal government—probably to make provision for contingencies that may have arisen making expedient the delivery of patents, though not the termination of the tribal existence which has not yet come to pass. It is for Congress and Congress alone to determine when the tribal government shall cease to exist.

Counsel for the appellants appear to hold the view that because the execution of deeds was authorized by the act of April 26, 1906, it became mandatory for the principal chief to exercise his authority at once.

That there was a very good reason for the Secretary of the Interior to withhold the approval and delivery of the Seminole deeds is apparent in a letter by the Secretary of the Interior to Hon. Robert L. Owen, United States Senator from Oklahoma and member of the Senate Committee on Indian Affairs, dated May 20, 1908—while the act of May 27, 1908, was still pending—the act which made the first appropriation for the expenses to have the deeds and other instruments clouding the title to restricted lands canceled, resulting in this litigation of which the two appeals being considered is a part. This letter reads as follows:

DEPARTMENT OF THE INTERIOR,
Washington, D. C., May 20, 1908.

[Subject: Patents to Seminoles.]

HON. ROBERT L. OWEN,
United States Senate,
Washington, D. C.

SIR: The Department has received your note of May 16, submitting letter of May 12 from ——— Attorney-at-law, Wewoka, Oklahoma, in which he says that patents in the Seminole Nation have never been delivered, and that great doubt as to the validity of any conveyances by the allottees before they are issued has created such a feeling of uncertainty upon the subject as to retard the growth of that country. He mentions the provisions of the Seminole agreement relating to tribal patents and asks why patents

are held up and not being delivered. You also ask for information on this subject.

The agreement between the United States and the Seminole Nation, approved July 1, 1898, (30 Stat. L. 567), provides:

“That all lands belonging to the Seminole tribe of Indians * * * shall be divided among the members of the tribe * * * and each allottee shall have the sole right of occupancy of the land so allotted to him, during the existence of the present tribal government, and until the members of said tribe shall have become citizens of the United States * * *.

“All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void * * *.

“When the tribal government shall cease to exist, the principal chief last selected by said tribe shall execute and deliver to each allottee a deed conveying to him all the right, title and interest of the said nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve said deed * * *.

“* * * Each allottee shall designate one tract of 40 acres which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity.”

The Act of Congress approved April 26, 1906, entitled “An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and

for other purposes." (34 Stat. L., 137) provides (Section 6) :

" * * * That the principal chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole government shall cease to exist."

Section 5 of the same act provides :

" That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee * * * and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes and when so recorded shall convey legal title and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same."

After the approval of this Act the Department took steps toward the issuance of patents to citizens of the Seminole Nation, but before it was ready to record or deliver any of these patents the Department learned that hundreds of the allottees of the Seminole tribe had been induced to execute what are believed by the department to be illegal deeds covering their allotments for ridiculously small sums of money, some instruments having been executed covering tracts of 60 acres for as small sums as from \$1.00 to \$5.00 and alleged " other valuable considerations," so that the Department felt

that the time had not arrived when the members of the tribe should be given their patents as these adult allottees, except full-bloods, may under existing law, alienate their lands, exclusive of homesteads, as soon as title passes, which is with the recording of the deed by the Commissioner to the Five Civilized Tribes. Moreover, J. F. Brown, principal Chief of the nation, vigorously protested against the delivery of the patents until all clouds on title caused by illegal conveyances, had been removed, and as a result of Mr. Brown's protest and an investigation by this Department of the conditions steps have been taken toward bringing suit in over 1300 cases. On account of the complications created by these conditions, the Department feels that it would not be justified at this time in recording and delivering patents, because if they were recorded and the allottees thereby became empowered to sell, the cloud resting on the title would prevent their getting anywhere near what the lands are reasonably worth should they sell them.

Very respectfully,

JESSE E. WILSON,
Assistant Secretary.

The reasons stated in that letter still hold good, and, accordingly, the Secretary of the Interior and the principal chief of the Seminole Nation have not deemed it proper to execute, record, and deliver the patents to the Seminole allottees.

In 1907 the principal chief of the Seminole Nation raised several questions which he submitted in a letter to the Secretary of the Interior, one of them being in reference to the delivery of the Seminole patents under the provisions of section 6 of the act of April 26, 1906. These questions were submitted by the Secretary of the Interior to the Attorney General, and by him decided in 26 Opinions of the Attorney General, page 340. Two of these questions relate especially to the matter of the delivery of the patents to the Seminole allottees:

(1) "Whether Congress has power to enact legislation authorizing the delivery of Seminole patents prior to the expiration of the Seminole tribal government."

(6) "Whether patents conveying the allotments to Seminole citizens should be delivered before the tribal government is actually extinguished."

The Attorney General reviewed the legislation and decisions relative to these questions, and held that Congress had power to authorize the delivery of Seminole patents prior to the time when the Seminole government should cease to exist; but in answer to the sixth question he says (p. 349):

* * * It is merely a matter of administration whether patents shall be delivered before or after the dissolution of the tribal government.

B. Acts of Congress imposing restrictions generally upon lands allotted to members of the Five Civilized Tribes prohibited the alienation of lands of some of the particular classes of Seminole Indians mentioned in the two classes of cases under consideration and were, and still are, in full force and effect, and as to the lands of other particular classes of Seminole Indians were in full force and effect at the date of the execution of the instruments complained of.

The appellants strongly urge their contention that from and after April 26, 1906, the Seminole allottees were vested with a complete title to their several allotments. This contention is as strongly combated by the Government because no patents had yet been issued. But, for the purpose of these appeals, suppose that this contention be conceded, the question of alienability of the special classes of lands involved in the two bills still remains. The Seminole agreement declared that all contracts for the sale, disposition, or encumbrance of any part of any allotment made *prior to date of patent* shall be void. The act of April 21, 1904 (33 Stat., 189), was the first that could possibly have modified this provision of the Seminole agreement. In this act it is provided (p. 204) that "all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said

tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe * * *."

It will be noticed that in this act the Seminole Tribe is not mentioned particularly by name and it has been seen that there was a marked difference between the acts of Congress relating to the Seminoles on the one hand and all the other four tribes on the other, and that in all the acts of Congress heretofore referred to in this brief the Seminoles have been included by name.

If it is decided that the provisions of this act of April 21, 1904, are as applicable to the Seminole Tribe as if it had been included by name and that with that act the provisions of earlier statutes granting to allottees in the Seminole Nation *the right of occupancy only* and making void all contracts for the sale, disposition, or encumbrance of any part of any allotment made *prior to date of patent* are superseded and that from that time on there is to be no distinguishing consideration in the legislation affecting the Five Civilized Tribes, then the provisions of the act of April 21, 1904 (*supra*), as to the class of lands mentioned must apply to the Seminoles as well as to each of the other tribes, but only to the extent that it applies to the Creek, Cherokee, Choctaw, and Chickasaw Indians.

So, too, this consideration must be given to sections 22 and 23 of the act of April 26, 1906 (34 Stat., 137, 145), providing:

Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian,

unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner.

And to sections 1, 4, 5, and 9 of the act of May 27, 1908 (35 Stat., 312):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-six, nineteen hundred and

thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an Act entitled "An Act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

* * * * *

Sec. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the

allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.

Sec. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void (p. 313).

* * * * *

Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life

or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section (p. 315).

In the Seminole Nation no title has been received to alienate. The title has not passed. A right of occupancy *only* was granted to the allottee and until patent shall issue all attempts to transfer his interest in the lands set apart for his occupancy is forbidden.

A. N. FROST,
HARLOW A. LEEKLEY,

Special Assistants to the Attorney General.

OCTOBER, 1911.

O

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1914

No. 121

THE DEMING INVESTMENT COMPANY, APPELLANT,

THE UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT OF
SOUTHERN DISTRICT OF NEW YORK

FILED FOR RECORD IN 1914

(121)

(22,402.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 781.

THE DEMING INVESTMENT COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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- 1 Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1910, of said Court.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the thirtieth day of September, A. D. 1909, a transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The United States of America was Appellant and G. L. Merriman, et al., were Appellees, which said transcript of record is in the words and figures following, to-wit:

- 2 In the Circuit Court of the United States, Eastern District of Oklahoma.

No. —.

THE UNITED STATES, Appellant,
vs.
G. L. MERRIMAN et al., Appellees.

The following is a transcript of such of the record and proceedings heretofore had in said case as has been ordered to be prepared and authenticated as necessary to the hearing in the Court of Appeals.

(a.)

The Bill of Complaint was filed in the Office of the Clerk on the 22nd day of July, 1908, and, with the endorsements thereon, except as to those transactions in paragraph six of the bill as to which special orders of dismissal upon the petition of the complainant have been heretofore ordered, is as follows:

In the Circuit Court of the United States for the Eastern District of Oklahoma.

In Equity. No. 340.

UNITED STATES OF AMERICA, Complainant,
vs.
G. L. MERRIMAN —, Defendants.

To the Honorable Judges of the Circuit Court of the United States for Eastern District of Oklahoma:

3 The United States of America, by Charles J. Bonaparte, Attorney-General of the United States, and William J. Gregg, United States Attorney for the Eastern District of Oklahoma, brings this bill, upon the recommendation of the Secretary of the Interior, against G. L. Merriman of Konawa, Oklahoma, a citizen of the State of Oklahoma; John C. Davis of Wewoka, Oklahoma, a citizen of the State of Oklahoma; William Crane of Earlboro, Oklahoma, a citizen of the State of Oklahoma; D. M. Bell of Shawnee, Oklahoma, a citizen of the State of Oklahoma; G. G. Harris of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Joseph B. Fulkerson of Wewoka, Oklahoma, a citizen of the State of Oklahoma; John Quinby of Earlboro, Oklahoma, a citizen of the State of Oklahoma; A. O. Simpson of St. Louis, Missouri, a citizen of the State of Missouri; Frank Jones of Ada, Oklahoma, a citizen of the State of Oklahoma; Tom Hope of Ada, Oklahoma, a citizen of the State of Oklahoma; T. C. Stout of Wewoka, Oklahoma, a citizen of the State of Oklahoma; J. O. Davis of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; W. C. Bruce of Neal, Oklahoma, a citizen of the State of Oklahoma; J. B. Stigall of Wewoka, Oklahoma, a citizen of the State of Oklahoma; T. H. Smith of Little, Oklahoma, a citizen of the State of Oklahoma; William F. Wesson of Wewoka, Oklahoma, a citizen of the State of Oklahoma; A. G. Hirschi, Oklahoma, a citizen of the State of Oklahoma; Maceon Henry, W. E. Taylor of Oklahoma City, Oklahoma, citizens of the State of Oklahoma; Z. G. Patterson of Clyde, Oklahoma, a citizen of the State of Oklahoma; J. L. Bayne of Tyrola, Oklahoma, a citizen of the State of Oklahoma; Mace Herndon, Konawa, Oklahoma, a citizen of the State of Oklahoma; Amos Campbell of Meridian, Oklahoma, a citizen of the State of Oklahoma; J. W. Price of Konawa, Oklahoma, a citizen of the State of Oklahoma; H. C. Ochiltree of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; Martin T. Farron of St. Louis, Missouri, a citizen of the State of Missouri; S. M. Numley of Franks, Oklahoma, a citizen of the State of Oklahoma; Henry and Anna Irving of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Thomas S. Cobb of Wewoka, Oklahoma, a citizen of the State of Oklahoma; R. H. Chase of Seminole, Oklahoma, a citizen of the State of Oklahoma; P. H. Weinberg of Wewoka, Oklahoma, a citizen of the State of Oklahoma; A. H. Thomas of Shawnee, Oklahoma, a citizen of the

State of Oklahoma; John Labords of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Weston Atwood of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; Heliker & Jarvis of Earlsboro, Oklahoma, a citizen of the State of Oklahoma; J. A. Baker of Lawton, Oklahoma, a citizen of the State of Oklahoma; Ella Biggers of Shawnee, Oklahoma, a citizen of the State of Oklahoma; J. M. Scroggins of Wewoka, Oklahoma, a citizen of the State of Oklahoma; W. C. Brown of Ansley, Nebraska, a citizen of the State of Nebraska; L. E. Patterson of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; O. F. McConnell of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Maurice L. Bodine of Medford, Oklahoma, a citizen of the State of Oklahoma; William H. Stephens of Wewoka, Oklahoma, a citizen of the State of Oklahoma; L. B. Heliker of Earlsboro, Oklahoma, a citizen of the State of Oklahoma; H. M. Tate of Wewoka, Oklahoma, a citizen of the State of Oklahoma; V. V. Harris of Konawa, Oklahoma, a citizen of the State of Oklahoma; Lawrence Brown of Holdenville, Oklahoma, a citizen of the State of Oklahoma; Frank James and Tom Hope of Ada, Oklahoma, a citizen of the State of Oklahoma; David N. Bell of Shawnee, Oklahoma, a citizen of the State of Oklahoma; Edmund Bruner of Wewoka, Oklahoma, a citizen of the State of Oklahoma; W. F. Evans of St. Louis, Missouri, a citizen of the State of Missouri; Oscar D. Strother of Seminole, Oklahoma, a citizen of the State of Oklahoma; Lawrence Browne of Holdenville, Oklahoma, a citizen of the State of Oklahoma; James Arrowsmith of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Sam Norton of Earlsboro, Oklahoma, a citizen of the State of Oklahoma; A. T. Biggers and Samuel Norton of Earlsboro, Oklahoma, a citizen of the State of Oklahoma; M. F. Dunleavy of Muskogee, Oklahoma, a citizen of the State of Oklahoma; John M. Dennis of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Charles J. Benson of Shawnee, Oklahoma, a citizen of the State of Oklahoma; Nettie Jarvis of Neal, Oklahoma, a citizen of the State of Oklahoma; Margaretta A. Crawford of Konawa, Oklahoma, a citizen of the State of Oklahoma; C. J. Benson of Shawnee Oklahoma, a citizen of the State of Oklahoma; W. A. Mitchell of Holdenville, Oklahoma, a citizen of the State of Oklahoma; Susie C. Peters of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Harry N. Rogers of Wewoka, Oklahoma, a citizen of the State of Oklahoma; W. T. Smith of Williamsburg, Kentucky, a citizen of the State of Kentucky; Donald Campbell of Wewoka, Oklahoma, a citizen of the State of Oklahoma; William M. Henry of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; Thomas S. Cobb of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Robert L. Baird of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; Katie Moore of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Young Pepper of Franklin, Kentucky, a citizen of the State of Kentucky; James C. Wilhoit of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Amo B. Cutlip of Wewoka, Oklahoma, a citizen of the State of Oklahoma; George B. Pains of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Robert M. Tate of

Wewoka, Oklahoma, a citizen of the State of Oklahoma; W. E. Dixon of Wewoka, Oklahoma, a citizen of the State of Oklahoma; John Silas of Wewoka, Oklahoma, a citizen of the State of Oklahoma; J. C. Wilhoit of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Mary N. Henry of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; J. O. Davis of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; John Anken of Konawa, Oklahoma, a citizen of the State of Oklahoma; H. T. King of Konawa, Oklahoma, a citizen of the State of Oklahoma; A. Keller of Konawa, Oklahoma, a citizen of the State of Oklahoma; J. S. Barham of Konawa, Oklahoma, a citizen of the State of Oklahoma; John W. Laborde of Earlsboro, Oklahoma, a citizen of the State of Oklahoma; H. R. Brown of Maud, Oklahoma, a citizen of the State of Oklahoma; R. C. Acres of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; Fannie Rogers of Wewoka, Oklahoma, a citizen of the State of Oklahoma; L. C. Lewis of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Frank R. Reed of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Thos. H. Smith of Little, Oklahoma, a citizen of the State of Oklahoma; Jno. W. Gilliland of Holdenville, Oklahoma, a citizen of the State of Oklahoma; Donald Campbell of Wewoka, Oklahoma, a citizen of the State of Oklahoma; V. V. Harris of Konawa, Oklahoma, a citizen of the State of Oklahoma; W. M. Pegg and Robt. M. Tate of *Konawa*, Oklahoma, a citizen- of the State of Oklahoma; W. A. Mitchell and Lawrence Brown of Holdenville, Oklahoma, a citizen- of the State of Oklahoma; James M. Aldridge of Paden, Oklahoma, a citizen of the State of Oklahoma; Joe H. Patterson of Wewoka, Oklahoma, a citizen of the State of Oklahoma; M. Ochiltree of Konawa, Oklahoma, a citizen of the State of Oklahoma; Pompey Phillips of Emahaka, Oklahoma, a citizen of the State of Oklahoma; L. E. Patterson of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; D. W. Jennings of Wewoka, Oklahoma, a citizen of the State of Oklahoma; J. H. Childers and J. W. Crump of Muskogee, Oklahoma, a citizen of the State of Oklahoma; W. E. Dixon of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Jacob Van Buskirk of Seminole, Oklahoma, a citizen of the State of Oklahoma; Marion B. Flesher of Wewoka, Oklahoma, a citizen of the State of Oklahoma; J. E. Forman of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Young Pepper of Franklin, Kentucky, a citizen of the State of Kentucky; Theron E. Criswell of Little, Oklahoma, a citizen of the State of Oklahoma; J. P. Yates Jr., of Comanche, Oklahoma, a citizen of the State of Oklahoma; S. M. Nunley of Franks, Oklahoma, a citizen of the State of Oklahoma; Alice King of Konawa, Oklahoma, a citizen of the State of Oklahoma; C. L. Merriman of Konawa, Oklahoma, a citizen of the State of Oklahoma; M. E. Keller, Konawa, Oklahoma, a citizen of the State of Oklahoma; J. C. Wilhoit of Wewoka, Oklahoma, a citizen of the State of Oklahoma; J. W. Smith of Wewoka, Oklahoma, a citizen of the State of Oklahoma; R. L. Thurmona of Wewoka, Oklahoma, a citizen of the State of Oklahoma; O. D. Strother of Wewoka, Oklahoma, a citizen of the State of Oklahoma;

7 Ed Prather of Dallas, Texas, a citizen of the State of Texas;

H. A. Ingram of Lexington, Oklahoma, a citizen of the State of Oklahoma; George Crump Jr., of Wewoka, Oklahoma, a citizen of the State of Oklahoma; A. E. Walker of Holdenville, Oklahoma, a citizen of the State of Oklahoma; D. W. Jennings of Wewoka, Oklahoma, a citizen of the State of Oklahoma; J. O. Davis of Oklahoma City, Oklahoma, a citizen of the State of Oklahoma; J. B. Gray of Ada, Oklahoma, a citizen of the State of Oklahoma; H. A. Born of Wewoka, Oklahoma, a citizen of the State of Oklahoma; O. D. Smith of Holdenville, Oklahoma, a citizen of the State of Oklahoma; S. A. Douglas of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Harry R. Brown of Muskogee, Oklahoma, a citizen of the State of Oklahoma; J. S. Barham of Konawa, Oklahoma, a citizen of the State of Oklahoma; J. H. Davis, C. F. Haworth, Pike Baker of Shawnee, Oklahoma, citizens of the State of Oklahoma; N. Bert Smith of Wewoka, Oklahoma, a citizen of the State of Oklahoma; O. L. Parsons of Wewoka, Oklahoma, a citizen of the State of Oklahoma; Amos Campbell of Wewoka, Oklahoma, a citizen of the State of Oklahoma; C. J. Benson, Shawnee, Oklahoma, a citizen of the State of Oklahoma; Elmo E. Jayne of Wewoka, Oklahoma, a citizen of the State of Oklahoma; George S. Carter of Shawnee, Oklahoma, a citizen of the State of Oklahoma; H. T. King and J. S. Barham of Konawa, Oklahoma, citizens of the State of Oklahoma; W. P. Dix of Shawnee, Oklahoma, a citizen of the State of Oklahoma; Charles M. Hirt of Pawhuska, Oklahoma, a citizen of the State of Oklahoma; J. B. Lydick of Shawnee, Oklahoma, a citizen of the State of Oklahoma; Isabelle S. Reed of Wewoka, Oklahoma, a citizen of the State of Oklahoma; F. S. Kelley of Wewoka, Oklahoma, a citizen of the State of Oklahoma; and thereupon your orator complains and says:

First.

Your orator shows that, pursuant to the terms of the treaties entered into between your orator and the Seminole tribe of Indians and the members thereof, your orator granted, by patent duly executed and delivered to the said Seminole tribe of Indians, certain lands located in the Indian Territory, now the eastern district of Oklahoma, and that, by the terms of said treaties and of the laws of the United States, your orator solemnly obligated itself to secure and protect the said Seminole tribe of Indians and the members thereof in the possession, use and enjoyment of, and the title of the lands so granted to them as aforesaid, and that, according to the terms of said treaties and of said acts of Congress relating thereto, and of the patent to said lands, the said Seminole tribe of Indians and every member thereof have at all times been, and now are, without authority and power to dispose of any of said lands or of any interest therein without the consent and authority of your orator, or otherwise than in the manner prescribed by your orator. The lands hereinafter, in paragraph numbered six, described are a part of the lands aforesaid.

Second.

Your orator further shows that the sovereign, the Government of the United States, by reason of the helpless and dependent character of the Indian tribes and nations, and of the several members thereof within its borders, especially the Seminole tribe of Indians and the several members thereof, is the guardian, and has exclusive dominion over and control of the property of said tribe of Indians and of the several members thereof, especially the said Seminole tribe of Indians and the several members thereof, by virtue of which there is imposed upon your orator the duty to do whatever may be necessary for their guidance, welfare and protection; that the said Seminole tribe of Indians has always been, and is now, recognized, treated and dealt with as a tribe of Indians by the Government of the United States and the several branches thereof; that said tribe of Indians is now under the care of an Indian Agent, duly appointed under the laws of the Congress of the United States; That the Congress of the United States still appropriates large sums of money for the benefit and protection of the said tribe of Seminole Indians and of the individual members thereof, and for the maintenance of schools for the education of the members of said tribe; that the Government of the United States, under and by virtue of the laws of the Congress of the United States, still has a large sum of money in its possession belonging to the said tribe of Indians, and that there still remains unallotted a large area of tribal lands, the common property of the said tribe.

Third.

Your orator further shows that in the exercise of its powers so to regulate, control and govern the affairs of the said Seminole tribe of Indians and the members thereof, having in view the welfare of the said Indians and the carrying out of its treaty obligations, the Congress of the United States, by an act approved July 1, 1898, the same being found in 30 Statutes at Large, page 567, provided that the land belonging to the said Seminole tribe of Indians in the present State of Oklahoma should be allotted in severalty among the members thereof, but deeming the said Indians to be untutored and improvident and still requiring the protection and supervision of the General Government, it was provided by the said Act of Congress of July 1, 1898 that all contracts for sale, disposition or encumbrance of any part of any allotment made prior to the date of the patent should be void.

Fourth.

And your orator further shows that each of the tracts of land hereinafter in paragraph numbered six, described is situated in the Eastern District of Oklahoma, and was, at the time of the transactions of sale or incumbrance mentioned in that paragraph allotted lands of the members of the Seminole tribe of Indians, and none were lands which had been patented to individuals at the time of the transactions in question; that the grantors in said transactions were not the

allottees; that all contracts for the sale, disposition of any of said allotments prior to the date of patent were expressly declared by law to be void; that this law applied to all allotments of Seminole lands not inherited from allottees; that accordingly, defendants had knowledge, and were, by said law, put upon inquiry and notice as to the inalienability of said unpatented lands, and had notice accordingly that the particular tracts had not been patented, any such patenting being a matter of public action and public record; that moreover, the unpatented condition of said allotted lands was notorious and of common knowledge, since none of the Seminole allotted lands have been patented; and that other public laws of congress and public agreements imposed further restrictions upon the transfer and incumbrance of the particular lands herein, in paragraph six, described, belonging to the particular class of tribal members herein mentioned, in addition to those arising from the absence of patenting, and these restrictions were known, notified and notorious in like manner.

Fifth.

Your orator further shows that each of the deeds, mortgages leases, contracts of sale, powers of attorney and other evidence of title or incumbrance upon tracts of land as hereinafter described and set forth, was secured by defendants in defiant, wilful and open violation of law, and of the duty which rested upon this nation and every member thereof, and for the purpose of unlawfully incumbering said lands allotted to members of the said Seminole tribe of Indians, all of whom, under the treaties and laws of the United States, were without power or authority to sell, alienate or incumber said lands in any manner whatsoever.

And your orator further shows that by filing for record and causing to be recorded the said deeds and other instruments of writing, each of the defendants herein named has unlawfully obtained for himself an apparent title of interest of record to the land hereinbefore described, all of which was done in defiance of said agency supervision and in open violation and contempt of the laws of the United States, to the great detriment, irreparable injury and loss of said Indians, and in direct interference with the supervision and control, policy and duty of the Government of the United States in that behalf, and in obstruction of the execution of the laws.

11-17

Sixth.

And your orator further shows that among said transactions were those hereinafter, under this sixth heading set forth. In such setting forth some abbreviations are employed for convenience, among others, the usual land office short descriptions by parts of sections; the letters N. E. S. W. signifying north, east, south, west; and the figures 2 and 4 signifying half and quarter sections, all the land being sections of townships determined by the Indian Meridian of longitude; the word surplus is used to signify allotment exclusive of homestead; one-half or other fraction blood signifies that the person has such a proportion of Indian blood of the tribe in which he is

enrolled; the recording in books numbered 1, 2, 3, etc., or lettered, signifies recording in books of the recording districts of Indian Territory when the date of recording given is prior to November 16, 1907, and to books of the register of deeds of the county of the State of Oklahoma when the date given is subsequent; the record of restriction division gives petitions for removal of restrictions, and the action taken or the fact that no action was taken.

List No. 3.

Seminole County.

Warranty Deed.

G. E. Lewis, Saskawa, Okla.,
to
John C. Davis, Wewoka, Okla.

Consideration \$600.00.
Dated Mar. 3, 1906.
Recorded Mar. 6, 1906.
Book G, page 210.
J. H. Fleet, notary.

SE/4 of SE/4 section 13, township 8 north, range 6 east.
Allotment of William Sango, age 23, Seminole $\frac{1}{4}$ blood, roll No. 101.

* * * * *

18

List No 2.

Seminole County.

Warranty Deed.

Kizzie Harjoe, Susie Haney (Larney), and Betsy Burden (Larney),
Little, Okla.,
to
T. H. Smith, Little, Okla.

Consideration \$600.00.
Dated August 28, 1905.
Recorded September 6, 1905.
Book G, Page 45.
W. W. Lucas, Notary.

E/2 of NE-4 of Section 28, NW/4 of NW/4 (Homestead) Section 27, Twp. 10 North, Range 7 East.
Allotment of Wa-fo-la-gee, age 65, Seminole fullblood, Roll No. 626.

NOTE.—Deed recites that grantors are sole heirs of Wa-fo-la-gee, deceased.

Kizzie Harjoe cannot be identified upon rolls.

Susie Haney (Larney) age 34, Seminole fullblood, Roll No. 825.

Betsy Burden (Larney) age 33, Seminole fullblood, Roll No. 1397.

* * * * *

19-22

List No. 3.

Seminole County.

Warranty Deed.

H. M. Tate, Wewoka, Okla.,
to

A. G. Hirschi, Oklahoma City, Okla.

Consideration \$30.00.

Dated August 19, 1907.

Recorded August 19, 1907.

Book F, Page 643.

Ack. before John W. Kieff, U. S. Commissioner.

W/2 of NE/4 of Section 3, Twp., 8 North, Range 6, East.

Allotment of Jacksey, age 30, Seminole halfblood, Roll No. 1044.

* * * * *

23-41

List No. 3.

Seminole County.

Warranty Deed.

R. M. Tate and M. P. Mathis, Konawa, Okla.,
to

J. O. Davis and H. C. Ochiltree, Oklahoma City, Okla.

Consideration \$1,000.00.

Dated Oct. 19, 1905.

Recorded Oct. 24, 1905.

Book G, page 93.

Mittie L. Arnold, notary.

Lot 1 and lot 2, section 2, township 6 north, range 5 east.

Allotment of Yarnah Palmer, age 8, Seminole $\frac{3}{4}$ blood, Roll No. 270.

* * * * *

10

THE DEMING INVESTMENT COMPANY VS.

42

List No. 3.

Seminole County.

Mortgage.

Ella Norton, Earlsboro, Oklahoma,

to

Deming Investment Company, Oklahoma City, Oklahoma.

Loan \$80.00.

Dated October 27, 1906.

Due March 14, 1907.

No date of record.

Page 542, Book 18.

SE/4 of NE/4 Section 35 SW/4 of NW/4 Section 36 Township 10 North, Range 5 East.

Subject to mortgage to F. W. Staur of \$400.00.

Of the allotment of Lucy Bruner, age 28, Seminole freedman, Roll No. 2066.

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List No. 3.

Seminole County.

Mortgage.

James Arrowsmith, Wewoka, Oklahoma,

to

Deming Investment Company, Oklahoma City, Oklahoma.

Loan \$100.00.

Dated October 29, 1906.

Recorded December 13, 1906.

Due November 1, 1908.

Book 16, page 253.

NE/4 of NW/4 of Section 26, Township 10 North Range 5 East.
A portion of the allotment of Daniel Barkus, age 24, Seminole freedman, Roll No. 2060.

SE/4 of NW/4 of Section 26, Township 10 North, Range 5 East.
A portion of the allotment of Amey Barkus, age 20, Seminole freedman, Roll No. 2062.

Subject to a mortgage given by John Quimby, Sam and Ella Norton to James Arrowsmith, all of Wewoka, Oklahoma.

Loan \$500.00.

Dated October 29, 1906.

Recorded December 13, 1906.

Maturity not stated.

Book 16, page 247.

44

List No. 3.

Seminole County.

Mortgage.

John Quimby, Sam and Ella Norton, Earlsboro, Oklahoma,
to
James Arrowsmith, Wewoka, Oklahoma.

Loan \$500.00.

Dated October 29, 1906.

Recorded December 13, 1906.

Maturity not stated.

Book 16, page 247.

NE/4 of NW/4 Section 26, Township 10 North, Range 5 East.

A portion of the allotment of Daniel Barkus, age 24, Seminole freedman, Roll No. 2060.

SE/4 of NW/4 of Section 26, Township 10 North, Range 5 East.

A portion of the allotment of Amey Barkus, age 20, Seminole freedman, Role No. 2062.

List No. 3.

Seminole County.

Mortgage.

Sam Norton, Ella and John Quimby, Wewoka, Oklahoma, or Earls-
boro, Okla.,
to

Deming Investment Company, Oklahoma City, Oklahoma.

Loan \$60.00.

Dated October 27, 1906.

Recorded November 27, 1906.

Due November 1, 1907.

Book 16, Page 199.

SE/4 of NE/4 E/2 of SW/4 of NE/4 of Section 26, Township 10 North, Range 5 East.

With existing mortgage to M. E. Sumkel for \$300.00. A portion of the allotment of Robin Bruner, age 32 Roll No. 2662, Seminole freedman.

* * * * *

45

List No. 3.

Seminole County.

Mortgage.

Sam Norton, Earlsboro, Oklahoma,
to
Deming Investment Co., Oklahoma City, Oklahoma.

Loan \$100.00.
Dated October 27, 1906.
Recorded January 26, 1907.
Maturity not stated.
Book 18, page 541.

E/2 of NE/4 Section 22, Township 10 North, Range 5 East, of the allotment of John Davis, age 24, Seminole freedman, Roll No. 2616.

E. 2 of NE/4 of NE/4 Section 23 Township 10 North, Range 5 East, of the allotment of, Ellen Sango, age 17, Seminole freedman, Roll No. 2641.

The above subject to a mortgage to E. E. Ford of \$500.00.

46 & 47

List No. 3.

Seminole County.

Mortgage.

Harry H. and Anna H. Rogers, Mounds, Oklahoma,
to
Deming Investment Company, Oklahoma City, Oklahoma.

Consideration \$70.00.
Dated December 22, 1906.
Recorded January 5, 1907.
Maturity not stated.
Book 17, page 232.

NW/4 of NE/4 Section 27, Township 8 North, Range 5 East.
Subject to mortgage to W. E. Dunaway of \$250.00. Of the allotment of Lucy Sancho, age 22, Seminole freedman, Roll No. 2654.

List No. 3.

Seminole County.

Real Estate Mortgage.

Sam and Ella Norton, Earlsboro, Oklahoma,
to
Deming Investment Company, Oklahoma City, Oklahoma.

Consideration \$80.00.
Dated October 27, 1906.
Recorded January 2, 1907.
Maturity not stated.
Book 17, page 220.

W/2 of NE/4 of Section 35 Township 10 North, Range 5 East.
Subject to a mortgage to E. E. Ford of \$400.00.
Part of the allotment of Douglass Bruner, age 28, Seminole freed-
man, Roll No. 2065.

* * * * *

48-55

List No. 3.

Seminole County.

Warranty Deed.

King and Dafney Cudjo
to
A. T. Biggers and Samuel Norton, Earlsboro, Oklahoma.

Consideration \$100.00.
Dated September 17, 1905.
Recorded September 28, 1905.
Book E, Page 252.
R. N. Bruner, Notary Public.
W. S. haston, Notary Public.

N/2 of SW/4 and NW/4 of SE/4 of Section 15, Township 10
North, Range 5 East, of the allotment of Sunday Cudjoe, deceased,
half blood Seminole, Roll No. 1684.

* * * * *

56-59

List No. 3.

Seminole County.

Mortgage.

Charles H. Weinberg, Wewoka, Oklahoma,
to
James Arrowsmith, Wewoka, Oklahoma.

Loan \$400.00.
Dated August 8, 1906.
Recorded August 17, 1906.
Date of maturity not stated.
Book 14, page 463.

S/2 of NW/4 SE/4 of NW/4 of NW/4 Section 28, Township 8 North, Range 7 East.

Part of allotment *on* Nina Davis, age 21, Seminole freedman, Roll No. 2364.

List No. 3.

Seminole County.

Mortgage.

Charles H. Weinberg, Wewoka, Oklahoma,
to
The Deming Investment Company, Oklahoma City, Oklahoma.

Loan \$80.00.
Dated August 8, 1906.
Recorded August 17, 1906.
Due July 1, 1908.
Book 14, page 467.

S/2 of NW/4 SE/4 of NW/4 of NW/4 Section 28, Township 8 North, Range 7 East.

A portion of the allotment of Rina Davis, age 21, Seminole freedman, Roll No. 2364.

* * * * *

60-64

List No. 3.

Seminole County.

*Warranty Deed.*Lawrence and Florence Browne, Holdenville, Oklahoma,
to

W. A. Mitchell, Holdenville, Oklahoma.

Consideration \$300.00.

Dated October 11, 1905.

Recorded October 12, 1905.

Book D, page 524.

Charles Rider, Notary Public.

Undivided half interest in SE/4 of SE/4 of Section 25, Township 9 North, Range 7 East, the homestead of Laura Island, age 10, Seminole freedman, Roll No. 2418.

NE/4 of NE/4 of Section 36, Township 9 North, Range 7 East, the homestead of Philip Cyrus, age 56, Seminole freedman, Roll No. 2329, also N/2 of NW/4 of NE/4 Section 36, Township 9 North, Range 7 East of the allotment of Philip Cyrus, as above described.

* * * * *

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List No. 3.

Seminole County.

*Quit Claim Deed.*V. V. Harris, Wewoka, Oklahoma,
to

L. E. Patterson, Ada, Oklahoma.

Consideration \$1.00.

Dated September 15, 1905.

Recorded September 30, 1905.

Book E, page 268.

W. P. Mathis, Notary Public.

N/2 of SE/4 of Section 22, Township 6 North, Range 6 East, of the allotment of Rosie Cudjo, age 18, Seminole freedman, Roll No. 2311.

W/2 of W/2 of SW/4 of SW/4 Section 34, Township 7 North, Range 5 East, of the allotment of Grace Davis, age 44, Seminole freedman, Roll No. 2395.

W/2 of NW/4 Section 18, Township 6 North, Range 8 East of the allotment of Pompey Phillips, age 33, Seminole freedman, Roll No. 2455.

Lot 1, (40.21 acres), Lot 2 (40.65 acres), NE/4 of SW/4 of Section 1, Township 6 North, Range 6 East, of the allotment of Ben Dindy, age 27, Seminole freedman, Roll No. 2439.

E/2 of SE/4 Section 33, Township 7 North, Range 7 East, of the allotment of Attie Lottie, age 45, Seminole freedman, Roll No. 2152.

SW/4 of NW/4, Lot 3 (41.51 acres) Lot 4 (41.07 acres), of Section 1, Township 6 North, Range 6 East of the allotment of Silas Thomas, age 18, Seminole freedman, Roll No. 2595.

N/2 of NW/4 and NW/4 of NE/4 of Section 27, Township 10 North, Range 6 East, of the allotment of Gertie Cudjoe, age 6, Seminole freedman, Roll No. 2044.

N/2 of NW/4 of Section 32, Township 8 North, Range 7 East, of the allotment of Solomon Bruner, age 18, Seminole freedman, Roll No. 2562.

S/2 of SE/4 of Section 27, Township 7 North, Range 6 East, of the allotment of Rebecca Thomas, age 23, Seminole freedman, Roll No. 2095.

N/2 of SW/4 of Section 34, Township 10 North, Range 6 East of the allotment of Tamer Stewart, age 6, Seminole freedman, Roll No. 2032.

E/2 of NW/4, NW/4 of NE/4 (homestead), of Section 6 Township 5 North, Range 6 East, of the allotment of Jacob Harjo, age 7, Seminole full blood, Roll No. 1758.

66-121

List No. 3.

Harris to Patterson, continued.

Lot 1 (36.97 acres), Lot 2 (37.13 acres), Lot 3 (37.27 acres), all in Section 6, Township 5 North, Range 6 East, of the allotment of Louis Harjo, age 6, full blood Seminole, Roll No. 1760.

W/2 of NW/4 and W/2 of SE/4 Section 11, Township 7 North, Range 5 East, of the allotment of Lena Jefferson age 15, full blood Seminole, Roll No. 1395.

E/2 of NW/4, of Section 11, Township 7 North, Range 5 East of the allotment of Lena Jefferson, age 19, full blood Seminole, Roll No. 13194.

SW/4 of SE/4, and SE/4 of SE/4 of Section 22, Township 6 North, Range 6 East, of the allotments of Randolph Cudjo, age 16, Seminole freedman, Roll No. 2212, and Josie Cudjo, age 18, Seminole freedman, Roll No. 2211, respectively.

S/2 of NE/4 of Section 12, Township 6 North, Range 6 East of the allotment of Rose Cudjo, age 70, Seminole freedman, Roll No. 2575.

NE/4 of SE/4 of Section 22, Township 7 North, Range 7 East, of the allotment of Oliver Davis, age 17, Seminole freedman, Roll No. 2585.

W/2 of Lot 4, Section 5, Township 7 North, Range 7 East, of the allotment of Mulcuzzy, age 17, a male full blood Seminole, Roll No. 1435.

E/2 of Lot 4 Section 5, Township 7 North, Range 7 East, of the

allotment of Mary Barcus, age 50, Seminole freedman, Roll No. 2601.

E/2 of SW/4 of NW/4 of Section 5, Township 7 North, Range 7 East, of the allotment of Johnoche age 49, full blood Seminole, Roll No. 73.

* * * * *

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Seventh.

Your orator further shows that it is informed, and verily believes, and therefore charges the fact to be, that the defendants herein named and each of them has heretofore unlawfully secured from the members of said Seminole tribe of Indians other unlawful deeds, conveyances, mortgages, powers of attorney and contracts for and about their said allotments, which the said Indians and freedmen had no authority to sell, alienate dispose of, contract about or incumber in any manner, as aforesaid, but that for the reason that such deeds, conveyances, mortgages, powers of attorney and contracts for and about their allotments have not been recorded by the said defendants, your orator is unable to give a minute and correct description of the same without the discovery from the defendants hereinafter in this bill prayed; and that the said defendants herein named are continuing to induce the members of the said Seminole tribe of Indians named in this bill and other members of the said tribe to make, execute and deliver to them, the said defendants, and to take and accept from the said Seminole Indians deeds, conveyances, mortgages, powers of attorney and contracts for and about their allotments, and threaten, publish, announce and declare that they will continue such unlawful acts and doings. And your orator is informed and believes, and so avers, that said documents and, in many cases, possession of the lands are being, and are about to be, obtained by said defendants for wholly improper purposes, and in fraud of said Seminoles. And your orator further shows and avers that the defendants will so continue their unlawful acts and doings and that their conduct as specifically alleged in paragraphs five and six hereof has, and their present and future conduct, as in this paragraph alleged, will, if continued, greatly harass your orator in the discharge of its duty to and in the administration of its policy in relation to said Indians, and compel it to bring many suits in order to annul and set aside the said deeds, conveyances,

123 mortgages, powers of attorney, leases and contracts for and about the said lands, which the defendants have taken, are taking, and will continue to take, as herein alleged. And said defendants have been and are taking possession of many of said tracts, as your orator is informed and believes, but your orator cannot, within the limited time deemed best for the filing of this bill, ascertain clearly, and set forth the facts with regard to the possession of particular tracts.

Eighth.

And your orator further shows that, in addition to the instruments of writing hereinbefore mentioned and specified, upward

of four thousand other instruments of writing, of a nature similar to those hereinbefore set forth, purporting to convey or to encumber or to affect the title of lands located within the eastern district of Oklahoma and only allotted to members of the Five Civilized Tribes, or belonging to said tribes, have been executed and placed on record by the defendants herein and other persons and corporations in contravention of the treaties entered into between your orator and the said several Indian tribes and the laws of the United States, and your orator shows that unless it shall be permitted to join in its bills numerous defendants, against each of whom your orator has a like cause of action, and against each of whom your orator seeks the same relief, and whose pretended claims are based upon similar facts and involve precisely the same questions of law, your orator will be driven to the necessity of bringing a great number of separate and distinct suits, and that it will be practically impossible for your orator to prosecute, and for the court to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time.

Ninth.

Your orator further shows that under and by virtue of the aforesaid treaties and acts of Congress, all of the deeds and other instruments of writing hereinafter mentioned constitute a damage to the titles of the said members of the said tribes, thereby greatly deteriorating the value of the interests of the said tribes and members of said tribes in their lands, and that defendants are interfering with the possession and rights of the said tribes and members of the said tribes in their said lands, and are seriously retarding the control and supervision of the Government over them, and are producing irreparable injury to your orator and the said tribes and members of said tribes. And your orator further shows that by reason of the duties, obligations and rights of the Government, as set forth in this bill, the Government is charged with the duty of protecting in the courts the rights of the said tribes and members thereof, and in that behalf is charged with a trust of a high and delicate character, and that in the performance of these obligations and trust duties it is necessary to seek the aid of this court to the end that the defendants herein named should not only be ousted from the possession of the said lands, but that the court should order the said several deeds and instruments of writing herein specified and described to be surrendered and delivered up for cancellation and the record purged of the same; that the court should order the defendants to discover all facts relating to their possession of said lands, and to set forth all deeds, conveyances, mortgages, powers of attorney, and contracts in their possession other than those particularly mentioned and described in this bill, in order that the same may be cancelled.

Tenth.

Your orator further shows that it has joined in this bill of complaint numerous defendants for the purpose of avoiding a multi-

plicity of suits to recover the possession of the said lands for the
 benefit of the said tribes and members thereof and for the purpose
 of avoiding a multiplicity of suits to enjoin such of the several de-
 fendants herein from continuing to occupy the said lands
 125 and from taking any further deeds or other instruments
 of writing purporting to convey the title to said lands, and
 a multiplicity of suits to have the deeds and instruments of writing
 which they have induced the said members to make, ordered sur-
 rendered and delivered up for cancellation and the record purged
 thereof: that the interest of your orator, as guardian and trustee for
 the Indians and as *parens patriæ*, is identical in all cases, and that
 the right of your orator for relief against the said several defendants
 is identically the same as against each, and the remedy against the
 said defendants hereinafter prayed for is precisely the same against
 each.

Forasmuch, therefore, as your orator is remediless in the premises
 at and by the strict rule of the common law, and is only reliev-able in
 a court of equity where matters of this kind are properly cognizable
 and reliev-able, and to the end that your orator may have that relief
 which it can only obtain in a court of equity, and that each of the
 defendants herein named may answer the premises, the benefit
 whereof is expressly waived by your orator, your orator prays:

First. That this honorable court, by its decree, shall adjudge and
 declare the said severa. deeds, leases, instruments of conveyance and
 encumbrance described in paragraph numbered six of this bill, to be
 void and of no effect as instruments of conveyance, and that the same
 be cancelled and annulled and altogether held for naught, and that
 the title to the lands herein described be held and decreed to be in the
 allottees or their heirs, subject to the terms, conditions and limita-
 tions contained in the treaties, agreements and laws of the United
 States.

Second. That the defendants in this bill named shall be required
 to make a full and true discovery and disclosure of all possession,
 claims to possession, deeds, conveyances, mortgages, powers of attor-
 ney, contracts, and other instruments of writing in the posses-
 126 sion or control of the said defendants, or which may have been
 made, providing for the sale and incumbrance of or in any
 manner contracting for a charging or binding or attempting so to
 contract for, charge or bind the lands allotted to any of the members
 of the Seminole tribe of Indians or unallotted lands of the tribe, set-
 ting forth a list or schedule showing as to such deeds, conveyances,
 mortgages, powers of attorney, contracts and other instruments of
 writing, the full names of all the parties thereto, the dates thereof and
 a correct description of the land therein attempted to be conveyed,
 mortgaged or contracted about, and that each of the said defendants
 shall be required to surrender and deliver up to this honorable
 court all such deeds, conveyances, mortgages, powers of attorney,
 contracts and other instruments of writing so discovered by them,
 and that this honorable court shall, by its decree, declare the same to
 be void and of no effect, and that the same shall be cancelled and an-

nulled and altogether held for naught, and the title to the lands therein mentioned and described be held and decreed to be in the tribes and members thereof to whom they were allotted under the provisions of the said act of July 1, 1898, or any other act, subject to the treaties, agreements and laws of the United States; that all rights of and to possession shall be declared to be in said Indians, — be ordered to vacate or cease making such claim; and that your orator may have such other and further relief in the premises as the nature and circumstances of this case may require, and as may be agreeable to equity and good conscience.

Third. That subpoenas and all proper process issue, making each and every one of the following named persons parties to said bill, and requiring each of them to appear upon a certain day and place, to be fixed by this honorable court, and answer fully the exigencies of this bill, but not under oath, which is hereby expressly waived.

127 G. L. Merriman, John C. Davis, William Crane, D. M. Bell, G. G. Harris, G. L. Merriman, Joseph B. Fulkerson, John Quimby, Sam Norton, A. O. Simpson, Frank Jones, Frank Jones, Tom Hope, T. C. Stout, Maud Stout, J. O. Davis, Robert Chowning, W. C. Bruce, J. B. and A. A. Stigall, T. H. Smith, William F. Wesson, A. G. Hirschi, J. O. Davis, Malcolm Henry, W. E. Taylor, J. C. Goggerty, Z. G. Patterson, J. L. Bayne, Mace Herndon, Amos Campbell, J. W. Price, R. W. Jones, J. O. Davis, H. C. Ochil-tree, Martin T. Farron, S. M. Nunley, Henry and Anna Irving, Thomas S. Cobb, R. H. Chase, T. D. Noe, P. H. Weinberg, A. H. Thomas, John Labords, Western Atwood, Heliker & Jarvis, J. A. Baker, Ella Biggers, J. M. Scroggins, W. C. Brown, L. E. Patterson, O. F. McConnell, Maurice L. Bodine, G. L. Merriman, Orlando F. McConnell, William H. Stephens, L. E. Patterson, L. B. Heliker, B. F. Davis, H. M. Tate, V. V. Harris, William Jarvis, W. A. Mitchell, Lawrence Brown, Frank James, Tom Hope, B. F. Davis, David N. Bell, Edmund Bruner, W. F. Evans, Oscar D. Strother, Lawrence Browne, Deming Investment Co., James Arrowsmith, Sam Norton, A. T. Biggers, Samuel Norton, M. F. Dunleavy, John M. Dennis, Charles J. Benson, Nettie Jarvis, Margaretta A. Crawford, C. J. Benson, V. V. Harris, C. D. Strother, W. A. Mitchell, L. E. Patterson, William Jarvis, G. G. Harris, Susie C. Peters, Harry H. Rogers, W. T. Smith, Donald Campbell, Vernon V. Harris, O. D. Strother, William M. Henry, Thomas S. Cobb, Robert L. Baird, Katie Moore, Donald Campbell, Young Pepper, James C. Wilhoit, Amo B. Cutlip, E. A. Smith, George H. Paine, Robert M. Tate, W. E. Dixon, John Silas, C. G. Harris, J. C. Wilhoit, Mary E. Henry, J. O. Davis, R. L. Thurmond, Ed Prather, H. A. Ingram, George Crump, Jr., A. E. Walker, D. W. Jennings, J. O. Davis, J. B. Gray, H. A. Born, O. D. Smith, S. A. Douglas, Harry R. Brown, J. S. Barham, J. H. Davison, N. Bert Smith, O. L. Parsons, Amos Campbell, C. J. Benson, Elmo E. Jayne, George S. Carter, H. T. Kink, J. S. Barham, W. P. Dix, Elmo E. Jayne, Charles M. Hirt, J. B. Lydick, W. P. Dix, Isabelle S. Reed, F. S. Kelley, R. C. Acres.

128 Fannie Rogers, L. C. Lewis, Frank H. Reed, Thomas H. Smith, John W. Gilliland, Donald Campbell, W. M. Pegg, James M. Aldridge, Joe H. Patterson, Pompey Phillips, J. H. Childers, W. J. Crump, W. E. Dixon, Jacob Van Buskirk, Marion B. Flesher, J. E. Foreman, Theron E. Griswell, J. P. Yates, S. M. Nunley, Alice King, M. E. Keller, John Anken, H. T. King, A. Keller, J. S. Bartham, John W. Laborde, H. R. Brown.

CHARLES J. BONAPARTE,

Attorney-General.

By CHARLES W. RUSSELL,

Ass't Att'y Gen'l.

WM. J. GREGG,

United States Attorney,

By HARLOW A. LEEKLEY,

Assistant U. S. Attorney.

CHARLES W. RUSSELL,

United States Assistant Attorney-General, of Counsel.

UNITED STATES OF AMERICA,

Eastern District of Oklahoma, ss:

On this, 21st day of July 1908, personally appeared before me, Clerk of the Circuit Court of the United States within and for said District, Harlow A. Leekley, who, being first duly sworn, deposes and says that he is an assistant United States Attorney for the eastern district of Oklahoma; that he has read the foregoing bill by him subscribed, and knows the contents thereof, and that the matters therein stated upon knowledge he knows to be true, and those upon belief he believes to be true.

HARLOW A. LEEKLEY.

Subscribed and sworn to before me, this the 21st day of July, 1908.

[SEAL.]

L. G. DISNEY, *Clerk,*

By FLORENCE HAMMERSLY. *D. C.*

129-172 Endorsed as follows: No. 340. In the United States Circuit Court for the Eastern District of Oklahoma. The United States vs. G. L. Merriman et al. Bill. Filed July 22, 1908. L. G. Disney, Clerk U. S. Circuit Court. Wm. J. Gregg, U. S. Att'y. Charles W. Russell, of Counsel.

* * * * *

173 Circuit Court of the United States, Eastern District of Oklahoma, at Muskogee.

In Equity. No. 340.

UNITED STATES

VS.

L. G. MERRIMAN et al.

The Separate Demurrer of Ed Prather, One of the Defendants in Said Cause.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto and for ground of demurrer shows:

I.

That this court has no jurisdiction of this controversy, for that, (a) there is alleged no diversity of citizenship and a subject matter of the value or amount of two thousand dollars or more, (b) there is no act providing for suits of this kind and bestowing jurisdiction on these courts, and (c) the remedy would be at law and not in equity.

II.

That this defendant's vendor, the Seminole freedman mentioned in said bill, has a full and perfect remedy for any wrong suffered at the hands of this defendant, and the United States sustains no such relation to a Seminole freedman as will enable it to maintain this character of suit, and the complainant is therefore without legal capacity to sue.

III.

That it does not appear that the complainant is entitled to the relief sought, but on the contrary it appears that this defendant holds under a Seminole freedman, and it does not appear that the land constituted a homestead or that the allottee was a minor or made a deed before the 21st day of April, 1904, and there is alleged nothing to impeach any conveyance.

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IV.

That the complainant's bill is exhibited against this defendant and others for distinct matters and causes, in no way alleged to be related or common or pursuant to any conspiracy, in consequence whereof there is a misjoinder of parties and causes of action, and said bill is multifarious.

V.

That the facts relied upon, and particularly those in connection with the right or absence of right to purchase the land in suit, are not set forth with sufficient certainty to inform this defendant of the complainant's theory and that which is to be proven or disproven.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurs thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

CARROLL & WALKER,
JAS. L. AUTRY,
A. L. BEATY,

Solicitors for said Defendant, Ed Prather.

Ed Prather makes solemn oath and says that he is the above named defendant and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

ED PRATHER.

Subscribed and sworn to before me, this 30th day of September 1908.

[SEAL.]

E. CAMMACK,
Notary Public, Dallas County, Texas.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

A. L. BEATY,
Of Counsel for said Defendant.

Endorsed: Eq. 340. United States vs. L. G. Merriman, et al. Separate Demurrer of Ed Prather. Filed October 2, 1908. L. G. Disney, Clerk U. S. Circuit Court Eastern Dist. Okla. Carroll & Walker, Jas. L. Autry, A. L. Beaty. P. 187-188.

* . * * * *

183 In the Circuit Court of the United States for the Eastern District of Oklahoma.

No. 340.

UNITED STATES et al., Plaintiffs,

vs.

G. L. MERRIMAN et al., Defendants.

Demurrer.

Now comes the defendant, James Arrowsmith and the Deming Investment Company, a corporation of the State of Oklahoma by

Butte, Boone & Johnson, their attorneys, and demur to the bill of complaint herein and for cause says:

1. That there is no equity in the bill.
2. Because the bill fails to allege that the allottees were in possession of the lands described at the commencement of this suit.
3. Because the bill admits possession in the defendants, showing that the plaintiffs have an adequate legal remedy at law by ejectment.
4. Because said bill is multifarious in that it joins divers and sundry defendants in regard to divers and sundry parcels of land without there being any common interest among the defendants as to the respective parcels or tracts of land.
5. Because at the time of the service of process herein, Congress had removed the restrictions thereon and thereby the United States Government lost its dominion and control over the persons and property of the said allottees, they no longer being wards of the Government after July 27, 1908.
6. Because the bill fails to allege the death of the allottees and fails to allege that the said allottees are living.

BUTTE, BOONE & JOHNSON,
*Solicitors for Defendants James Arrowsmith
and Deming Investment Company.*

I, Robert J. Boone, of counsel for the above named defendant, do hereby certify that in my opinion the above and foregoing demurrer is well founded in point of law.

ROBERT J. BOONE.

184-188 STATE OF MISSOURI,
Buchanan County, ss:

Before me personally came this day James Arrowsmith who being duly sworn, says that he is one of the defendants in the above entitled cause and that the foregoing demurrer is not interposed for the purpose of delay only.

JAMES ARROWSMITH.

Subscribed and sworn to before me this 11th day of September 1908.

[SEAL.]

EUGENE AYRES,
Notary Public.

My Commission expires May 25, 1909.

Endorsed as follows: No. 340. United States et al., Plaintiffs, vs. G. L. Merriman et al., Defendants. Demurrer. Filed Sep. 21, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern District, Okla. Butte, Boone & Johnson, Attorneys for defendant, James Arrowsmith and Deming Inv. Co.

* * * * *

189 In the United States Circuit Court for the Eastern District of Oklahoma.

No. 284. In Equity.

THE UNITED STATES OF AMERICA, Complainant,
vs.

JAMES P. ALLEN et al., Respondents.

And Similar Cases.

Opinion.

The United States as complainants have filed in this court numerous bills, in each of which many individuals are made defendants. Each bill has relation to lands of one of the five Civilized Tribes. In the first paragraph of each bill, it is alleged that pursuant to the terms of certain treaties entered into between the United States and the tribe referred to, the United States granted by patent to each tribe certain lands in the Indian Territory, now the Eastern District of Oklahoma, and that by the terms of said treaties and the laws of the United States, the United States solemnly obligated themselves to secure and protect such tribe of Indians and the members thereof in the possession, use and enjoyment of and the title to said lands, and that, according to the terms of said treaties and of said acts of Congress relating thereto, and of the patent to said lands, the said tribe of Indians and every member thereof, have at all times and are now without power to dispose of any part of said lands or of any interest therein without the consent and authority of the United States or otherwise than in the manner prescribed by the United States.

It is alleged that by reason of the helpless and dependent character of such Indians tribe and the several members thereof, the United States as the guardian have exclusive dominion over and control of the property of said tribe and the several members thereof by virtue of which there is imposed upon the United States the duty to do whatever necessary for the guidance, welfare and protection of such Indians; that said tribe has always been and is now recognized, treated, and dealt with as a tribe of Indians by the United States, under the care of an Indian Agent; that Congress still appropriates large sums of money for the benefit and protection of said tribe and the individual members thereof, and for school purposes; that the United States still have in their possession a large sum of money belonging to said tribe, and that there still remains unallotted a large body of land, the common property of such tribe.

Reference is then made to the act or acts of Congress under which the lands of such tribe have been allotted to the individual members thereof, subject to the various restrictions against the

190 alienation thereby imposed. Paragraph IV of the bill then sets forth the character of the land involved at the date of the conveyance sought to be cancelled, as to whether allotted or tribal. For convenience, the bills may be classified as follows:

Cherokee Nation.

No. 1. All cases of conveyance by allottees to defendants where restrictions will be removed July 27, 1908.

No. 2. All cases of land not allotted at the time of conveyance complained of, but sold by a person claiming a right to be enrolled, and later denied citizenship.

No. 3. Sales, without the approval of the Secretary, of lands inherited by full blood heirs. Before April 26, 1906.

No. 4. Same as above, after April 26, 1906.

No. 5. Homestead of freedmen.

No. 6. Conveyance by other than allottee covering land allotted at date of conveyance.

No. 7. Conveyance by other than allottee covering lands which were tribal at date of conveyance.

No. 8. Homesteads of Intermarried Whites.

No. 9. Mixed bloods. Homesteads of $\frac{1}{2}$ bloods and more, and surplus of $\frac{3}{4}$ blood and more.

No. 10. Full bloods, prior to April 26, 1906.

No. 11. Full bloods, after April 26, 1906.

In the Creek Nation the bills may be classified the same as above, except that there is no bill No. 8. In the Choctaw and Chickasaw Nations the bills may be classified as above. In addition, there is, as to these nations, a bill covering Choctaw and Chickasaw lands sold prior to the removal of restrictions under the Act of July 1, 1908. As to the Seminole Nation, the bills may be classified as follows:

Conveyances by freedmen after allotment and before issuance of patent;

Conveyances by full blood heirs; before issuance of patent.

Conveyances by mixed bloods before the issuance of patent.

Conveyances by other than allottees.

Conveyances by adopted citizens before issuance of patent.

Conveyance by full bloods.

191 It is to be noted that all the bills involve lands which had been allotted at the time of the conveyance complained of, except Nos. 2 and 7. None of the bills applying to the Seminole Nation involve unallotted lands. In class No. 2 it is alleged that the tracts of land involved comprise lands of the tribe which had never been allotted at the time of the execution and delivery and recording of the conveyances sought to be cancelled, but were then tribal lands, and that no individual, at that time, nor ever has had any separate ownership thereof, or right to transfer or incumber the same. In class No. 7 it is alleged that, at the date of the conveyance sought to be cancelled, the lands were tribal lands, but it is not alleged that they are still tribal and unallotted. Paragraph 5 of the bill then proceeds substantially as follows:

"Your orator further shows that each of the deeds, mortgages,

leases, contracts of sale, powers of attorney and other evidence of title or incumbrance upon tracts of land as hereinafter set forth, was secured by defendants in defiant, wilful, and open violation of law, and the duty which rested upon this nation and every member thereof, and for the purpose of unlawfully incumbering said lands allotted to members of the said Seminole tribe of Indians, all of whom, under the treaties and laws of the United States, were without power or authority to sell, alienate, or incumber said lands in any manner whatsoever, and your orator further shows that by filing for record and causing to be recorded the said deeds and other instruments of writing, each of the defendants herein named has unlawfully obtained for himself an apparent title or interest of record to the land hereinbefore described, all of which was done in defiance of said agency supervision and in open violation and contempt of the laws of the United States, to the great detriment, irreparable injury and loss of said Indians, and in direct interference with the supervision and control, policy and duty of the Government of the United States in that [*behold*], and in obstruction of the execution of the laws."

Paragraph 6 then sets forth in detail the various conveyances sought to be cancelled, involving numerous separate and distinct tracts of land in each of which conveyances, in most instances, the individual allottee or those claiming through him, appear as grantors, and one or more of the defendants appear as grantees.

Paragraph 7 alleges upon information and belief that the defendants have secured, or are proceeding to secure, other unlawful conveyances not now recorded, a minute description of which
192 the pleader alleges cannot be given without the discovery prayed for, and that the defendants are continuing to induce the members of the tribe to execute and deliver to them such conveyances, etc, and in many instances are taking possession of the lands covered by such conveyances for wholly improper purposes, and in fraud of the said tribe. The bill then proceeds:

"And your orator further shows and avers that the defendants will so continue their unlawful acts and doings and that their conduct as specifically alleged in paragraphs 5 and 6 hereof, as all their present and future conduct, as in this paragraph alleged, will, if continued, greatly harass your orator in the discharge of its duty to and in the administration of its policy in relation to said Indians, and compel it to bring many suits in order to annul and set aside the said deeds, conveyances, mortgages, powers of attorney, leases, and contracts for and about the said lands, which the defendants have taken, are taking, and will continue to take as herein alleged."

The bill then proceeds specifically as follows:

Eighth.

"And your orator further shows that, in addition to the instrument of writing hereinbefore mentioned and specified, upward of four thousand other instruments of writing, of a nature similar to those hereinbefore set forth, purporting to convey or to encumber or to affect the title of lands located within the Eastern Judicial District

of Oklahoma, and only allotted to members of the Five Civilized Tribes, or belonging to said tribes, have been executed and placed on record by the defendants herein and other persons and corporations, in contravention of the treaties entered into between your orator and the said several Indian tribes and the laws of the United States and your orator shows that unless it shall be permitted to join in its bill of numerous defendants, against each of whom your orator has a like cause of action, and against each of whom your orator seeks the same relief, and whose pretended claims are based upon similar facts and involve precisely the same questions of law, your orator will be driven to the necessity of bringing a great number of separate and distinct suits, and that it will be practically impossible for your orator to prosecute and for the court to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time."

Ninth.

"Your orator further shows that under and by virtue of the afore-
said treaties and acts of Congress, all of the deeds and other
193 instruments of writing hereinafter mentioned constitute a
damage to the titles of the said members of the said tribes
thereby greatly deteriorating the value of the interests of the said
tribes and members of said tribes in their lands, and that defendants
are interfering with the possession and rights of the said tribes and
members of the said tribes in their said lands, and are seriously re-
tarding the control and supervision of the Government over them,
and are producing irreparable injury to your orator and the said
tribes and members of said tribes. And your orator further shows
that by reason of the duties, obligations, and rights of the Govern-
ment, as set forth in this bill, the Government is charged with the
duty of protecting in the courts the rights of the said tribes and mem-
bers thereof, and in that behalf is charged with a trust of a high and
delicate character, and that in the performance of these obligations
and trust duties it is necessary to seek the aid of this court to the end
that the defendants herein named should not only be ousted from
the possession of the said lands, but that the court should order the
said several deeds and instruments of writing herein specified and de-
scribed to be surrendered and delivered up for cancellation, and the
record purged of the same; that the court should order the defend-
ants to discover all facts relating to their possession of said lands,
and to set forth all deeds, conveyances, mortgages, powers of attorney,
and contracts in their possession, other than those particularly men-
tioned and described in this bill, in order that the same may be can-
celled.

Tenth.

"Your orator further shows that it has joined in this bill of com-
plaint numerous defendants for the purpose of avoiding a multiplica-
tion of suits to recover the possession of the said lands for the benefit
of the said tribes and members thereof, and for the purpose of avoid-
ing a multiplicity of suits to enjoin each of the several defendants

herein from continuing to occupy the said lands and from taking any further deeds or other instruments of writing purporting to convey the title to said lands, and a multiplicity of suits to have the deeds and instruments of writing which they have induced the said members to make, ordered surrendered and delivered up for cancellation and the record purged thereof; that the interest of your orator, as guardian and trustee for the Indians and as *parens patriæ*, is identical in all cases, and that the right of your orator for relief against the said several defendants is identically the same as against each, and the remedy against each of the said defendants hereinafter prayed for is precisely the same as against each. For as much, therefore,

194 as your orator is remediless in the premises at and by the strict rule of the common law, and is only relieviable in a court of equity, where matters of this kind are properly cognizable and relieviable, and to the end that your orator may have that relief which it can only obtain in a court of equity, and that each of the defendants herein named may answer the premises, the benefit whereof is expressly waived by your orator, your orator prays: * * *

The prayer of each bill is, first, that the conveyances set forth in paragraph six shall be decreed to be void and of no effect as instruments of conveyance and shall be cancelled, and that the title to the lands therein described be held and decreed to be in the allottee or their heirs, subject to the terms, conditions, and limitations contained in the treaties, agreements, and laws of the United States. It is further prayed that the defendants shall be required to make discovery and disclosure of all other possessions, claims to possession, deeds, conveyances, mortgages, powers of attorney, contracts and other instruments of writing, setting forth a list or schedule thereof in their possession, conveying the lands allotted to any of the members of the said tribe, or unallotted lands of the said tribe; and that the defendants be required to surrender and deliver up to the court all such deeds, etc.; and that the same be cancelled, and such lands decreed to be in the tribe or members thereof to whom they have been allotted; and that all defendants in possession or claiming possession thereof be ordered to vacate or cease making such claim; and then follows the usual prayer for subpoena.

Many of the defendants filed demurrers to these bills, and a date was set by the court for hearing arguments thereon, and all such demurrers were presented at the same time, fully argued by counsel, and thereupon submitted to the court. The demurrers set up many grounds, the main ones of which are in substance as follows: That the court is without jurisdiction; that the bill of complaint fails to show any such interest in the plaintiff as would entitle it to maintain these suits; because the plaintiff has no capacity to maintain these suits; because the bill of complaint is wholly devoid of equity; because by said bill it is sought to quiet title to land of which the plaintiff is not now and has never been in possession; because there is a defect of parties to these suits; because there is a misjoinder of alleged causes of action in this: That the alleged cause of action against each defendant is improperly joined with that of numerous other defend-

ants when there is no joint interest as between the defendants
 195 or any joint occupation of the property or any reason that
 would authorize the joint suit alleged; because the bills are
 multifarious; because the bills do not disclose such a state of facts as
 entitle plaintiff to recover in any event.

While a few of the bills filed relate to transactions alleged to have
 taken place prior to allotment of the lands involved, it appears that
 such lands have since been allotted, and we have now to consider only
 lands of the Five Civilized Tribes allotted to citizens thereof.

The contention that the Court has no jurisdiction is unsound, if
 the United States are properly parties plaintiff, because wherever the
 United States appear as parties plaintiff or petitioners, the Circuit
 Court of the United States has jurisdiction. Constitution, Art. 3, Sec.
 2, Clause 1. Act of Congress of '87-8, 25 Stat. at Large, 433.

The question of the capacity of the United States to sue involves
 the question as to whether they have such an interest in the contro-
 versy as will entitle them to maintain the suits, for unless they have
 such interest, either by way of title in the land, or duty or obligation
 in relation to the allottees and the lands involved, the demurrers
 on this point must be sustained. In *United States vs. San Jacinto
 Tin Co.*, 125 U. S. 273, a suit to annul and set aside a patent, the
 court says:

"But we are of opinion that since the right of the government of
 the United States to institute such a suit depends upon the same gen-
 eral principles which would authorize a private citizen to apply to a
 court of justice for relief against an instrument obtained from him
 by fraud or deceit, or any of these other practices which are admitted
 to justify a court in granting relief, the government must show that,
 like the private individual, it has such an interest in the relief sought
 as entitles it to move in the matter. If it be a question of property a
 case must be made in which the court can afford a remedy in regard
 to that property; if it be a question of fraud which would render the
 instrument void, the fraud must operate to the prejudice of the
 United States, and if it is apparent that the suit is brought for the
 benefit of some third party, and the United States has no pecuniary
 interest in the remedy sought, and is under no obligation to the party
 who will be benefited to sustain an action for his use; in short, if
 there does not appear any obligation on the part of the United
 196 States to the public, or to any individual, or any interest of its
 own, it can no more sustain such an action than any private
 person could under similar circumstances."

Has the government any interest, by way of ownership of or title
 to these allotted lands? They were originally granted by patent to
 the respective tribes, to be owned and held by them while their tribal
 relations should exist, or until they should abandon the same. The
 treaty with the Choctaws provided that the land should be granted
 to them "in fee simple to them and their descendants, to enure to
 them while they should exist as a nation and live on it." (Kappler,
 p. 311, 7 Stat. 333) This same title was vested in the Chickasaws,
 (Kappler 11 Stat. 573) By treaty with the Cherokees (7 Stat. 478),
 it was agreed that the lands ceded to them should be conveyed to

them by patent, according to the provisions of the act of May 28, 1830, above referred to, and patent was issued accordingly. By treaty with the Creeks, it was provided that the lands assigned them should be granted by patent in fee simple, and that the right thereby granted should be continued to said tribe so long as they should exist as a nation and continue to occupy the same. (7 Stat. 417). By treaty of 1866 (14 Stat. 755), the United States granted and sold to the Seminole Nation the major part of if not all of the land now allotted to them, for the sum of fifty cents per acre, a total sum of a hundred thousand dollars. This appears to have been an unconditional grant. The above land so, granted to the several tribes was occupied by them in their tribal capacity until the allotment of these lands in severalty to the individual members, with the consent of the government, so that the tribal extinction or abandonment contemplated in the treaties is no longer to be considered. Since the utmost interest by way of title which it can possibly be contended remained in the government was the possibility of its reverting upon such tribal extinction or abandonment, it follows that no vestige of title to these lands now remains in the United States. These lands are now allotted lands for which allotment certificates have been issued, followed, in many instances, by patent, so that the equitable title at least has passed to the individual allottees. (*Wallace vs. Adam*, 143 Fed. 716).

Under the general allotment act, where the title passes direct from the government to the allottee, the issuance of patent passes title to the allottee in fee simple, and under no circumstances does it revert to the United States. *Schrimpsheer vs. Stockton*, 183 U. S. 290.

There is less reason why it should revert here.

197 It follows that the complainant can claim no such interest by way of title to these lands as would entitle it to maintain these suits.

In the act of Congress approved May 27, 1908, relative to the removal of restrictions is found the following provision:

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same in cases where deeds, leases or contracts or any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof: such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act."

It is contended that this provision confers upon complainant authority to institute and maintain these suits in the name of the United States. The dominant purpose of this provision seems to be to preclude any such construction of the act as would deny the United States the right to bring such suits referred to, rather than to confer such right. The bill, as originally introduced, did not contain

this provision. On February 10, 1908, at the same session, a bill was introduced by Mr. Sherman, in the House, and Senator Clapp, in the Senate, specifically conferring upon the Attorney General the right to bring such suits in the name of the United States, "for the use and benefit and on behalf of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes, or any enrolled member of either thereof". This bill covers over six pages, providing in detail for the conduct of such suits, and also providing for the transfer from the state to the federal courts of such suits in which the United States may become a party, as provided in the bill. This bill did not become a law. After its introduction and while the committee on Indian Affairs was considering the act of May 27, 1908, the Assistant Attorney General, for the Interior Department, appeared before the committee (Report of Committee on Indian Affairs for March 20, 1908), stating that the Department was in favor of the bill under consideration, but calling attention to the jurisdictional bill above referred to, saying that "the Department believes that some provision for jurisdiction should be passed with the other bill, for these reasons, briefly, that if it is not necessary, it could do no damage." He then referred to a

198 number of cases arising in the state courts, wherein he deemed it advisable that provision be made for removal to the federal court. He said "the Department feels that if the restrictions bill should be passed separately that there would be no possible chance, perhaps, to enact this other bill, because the term is approaching its end, and it is very difficult to get legislation when there is any direct active opposition to it. That being the history of such efforts it is the feeling of the Department that the two should be passed together."

Then followed a lengthy discussion between the representatives of the Department and members of the committee, relative to incorporating such jurisdictional provisions. It was conceded that without such provision, the existence of the authority and jurisdiction was not without question, the Assistant Attorney General insisting, however, that it already existed. Three of the Oklahoma representatives on the committee opposed the incorporation of a measure granting additional jurisdiction, insisting that only such powers and jurisdiction as already existed by virtue of the enabling act and other legislation should be exercised by the federal government, and conceded that if they existed, their exercise was proper. Finally the paragraph now being considered was incorporated.

The jurisdiction bill which failed was one positively and specifically conferring the authority and jurisdiction as if they had not theretofore existed. This provision is negative in its terms, not purporting to confer the right, but disavowing any intention to deny the same. Therefore, it can hardly be said that these eleven lines were incorporated in this bill in lieu of the jurisdiction bill containing over six pages.

In view of this legislative history, it is my opinion that it was only intended by this paragraph to provide that if by existing legislation the United States had authority to institute and maintain such suits, it was not the desire nor the intention of Congress for this act to deny it, and it should not be so construed. It is urged that the appropria-

tion of money for such suit is a legislative recognition of their validity. In my judgment, it cannot be so construed in this case. It is the expressed purpose of Congress not to deny the right if it existed. A refusal to provide money for the conduct of such suits would have prevented their institution and maintenance, resulting the same as a denial of the right. Hence the appropriation. The authority of the complainant to maintain these suits, if it exists, must be found elsewhere.

199 In the recent opinion of this court, overruling the demurrers in the town lot cases, the history of these Indians was thus reviewed:

"In the early part of the last century the Creek, Cherokee, Chickasaw, Choctaw, and Seminole tribes of Indians, known as the Five Civilized Tribes, occupied in their tribal capacity various portions of the states east of the Mississippi River. The growth and development in these then new states had caused the conflict between the advancing civilization of the white man and the habits and customs of these tribes to become more marked. The Indians as a rule were not then sufficiently advanced toward the civilization of their white neighbors to adapt themselves to the new order of things, and to merge these tribes into the body politic of the state was found to be impracticable. It was therefore apparent to Congress that some disposition of these Indians must be made. The plan of giving them in exchange for their lands east of the Mississippi, portions of the public domain west of the Mississippi, where, as it then appeared, they would be undisturbed by the encroachment of white men for years to come, was finally devised, and on May 28, 1830, an act of Congress was passed (4th Stats. at Large 411) providing that the President might cause the country west of the Mississippi, not within any state or organized territory and to which the Indian title had been extinguished, to be divided up into districts for the reception of such tribes or nations of Indians who might choose to exchange lands then occupied by them for such districts and remove thereto. This act contained the following provisions:

"SEC. 3. And be it further enacted, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided, always, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same."

Referring to the above act of Congress, it was said by Mr. Justice Davis, in the *Kansas Indians*, 5 Wallace 737.

"The well defined policy of the Government demanded the removal of the Indians from organized states, and it was supposed at the time the country selected for them was so remote as never to be needed for settlement, etc."

200 The Senate Committee, whose report is quoted in *Stevens vs. Cherokee Nation*, 174 U. S. 448, took occasion to say, with reference to the Five Civilized Tribes:

"This section of country was set apart to the Indian with the avowed purpose of maintaining an Indian community beyond and away from the influence of white people. We stipulated that they should have unrestricted self-government and full jurisdiction over persons and property within their respective limits, and that we would protect them against intrusion of white people, and that we would not incorporate them in a political organization without their consent. Every treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of the Indians from the whites, and non-participation by the whites in their political and industrial affairs. We made it possible for the Indians of that section of country to maintain their tribal relations and their Indian polity, laws and civilization if they wished so to do. And, if now, the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a population of strangers five times in number to their own, it is not the fault of the Government of the United States, but comes from their own acts in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction, to become traders, farmers, and to follow professional pursuits

It must be assumed in considering this question that the Indians themselves have determined to abandon the policy of exclusiveness, and to freely admit white people within the Indian Territory, for it cannot be possible that they can intend to demand the removal of the white people either by the Government of the United States or their own. They must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time abandoned forever."

It is common knowledge of persons conversant with local history that the situation had become such in 1893 that Congress decided that existing conditions should be changed, and that steps should be taken looking to ultimate statehood for Indian Territory and its inhabitants, Indian as well as white. By the appropriation act of that year, 27 Stat. at Large 612-645, a committee consisting of three members was provided for, to enter into negotiations with these tribes for the purpose of the relinquishment of the tribal title and the allotment of the lands in severalty to the individual members, having in view the ultimate creation of a state or states of the union which would embrace these lands. Up to this time, the policy of

201 the government had been to exclude white persons from these lands and from commingling with these Indians, but experience had shown this could no longer be done. The Indians themselves, by permitting intermarriage and by various ways, had defeated the governmental policy, and the white non-citizen population in the Indian Territory greatly outnumbered the Indians, and were constantly increasing. They were not amenable to the Indian Government. The Indian governments were far from satisfactory to the

Indians themselves. Such was the condition that the Senate committee was forced to report:

"It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government cannot be continued; it is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change cannot be much longer delayed. There can be no modification of the system. It cannot be reformed; it must be abandoned and a better one substituted." *Stephens vs. Cherokee Nation*, *supra*, p. 451.

This was the situation which forced Congress to a radical change of policy and a determination to effect a state government for Indian Territory as soon as it could be accomplished consistent with the rights and interest of the Indians. In the Indian Appropriation Act of 1896 (29 Stat. 321) Congress said:

"It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory, and afford needful protection to the lives and property of all citizens and residents thereof."

The work of preparing for this change fell upon the commission, first known as the Dawes Commission, and, latterly, as the Commission to the Five Civilized Tribes, acting under successive Congressional enactments and agreements with the tribes. The titles to the lands occupied by the various tribes vested in the respective tribes, and not in the individual members. *Cherokee Nation vs. Journey-cake*, 155 U. S. 196; *Shulthis vs. MacDougal*, 162 Fed. Rep. 331.

The work of the committee was first to determine who were the members of the tribes, and then to effect a division or allotment of the lands among them. Agreements were entered into with the various tribes, pursuant to which this allotment of lands was made.

In most instances the allottee took his land subject to restrictions upon alienation or incumbrance for a specified time, and 202 it is the alleged sales or other disposition of such lands by the allottee before the expiration of the restriction period that has given rise to most of the suits now being considered. Their purpose is to restore to him the possession where he is not now in possession, and to cancel and annul, as a cloud upon the title, all instruments involved in such sales or disposition. It is clear, therefore, that the allottee himself is vitally interested in the relief sought. Are his personal status and his relations to the United States such that these suits may be maintained solely in the name of the United States? As to his personal status, a pertinent inquiry is.

Are the members of the Five Civilized Tribes citizens of the United States? At the time they were granted the land comprising the Indian Territory and during all the years they held the same up to the time when Congress first took active steps to effect an allotment in severalty, they were not citizens of the United States. *Elk vs. Wilkins*, 112 U. S. 99.

In the act of Congress of May 2, 1890, 26 Stat. 99, establishing United States court in Indian Territory, it was provided that "Any

member of any Indian tribe or nation, residing in the Indian Territory, may apply to the United States Court therein to become a citizen of the United States, and such court shall have jurisdiction thereof and shall hear and determine such application, as provided in the Statutes of the United States." But few Indians availed themselves of this privilege.

In the Indian Appropriation Act of March 3, 1893, 27 Stats. 645, is found the following provision:

"The consent of the United States is hereby given to the allotment of land in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

In the general allotment act of 1887 these Indians had been specifically excluded from its provisions. That act provided
203 that those Indians receiving allotments under its terms should become citizens of the United States. Now, six years later Congress, by the section just quoted, consents that the Five Civilized Tribes may allot lands in severalty to each of their members, as they may deem proper, and upon such allotment extends to such allottees the right of United States citizenship in all respects.

Section 16 of the same act provides for the Commission to the Five Civilized Tribes to enter into negotiations with the tribes for the purpose of the extinguishment of the national or tribal title to their lands and the allotment of the same in severalty to the individual members, with the view to such an adjustment upon the bases of justice and equity, as met with the consent of such nations or tribes of Indians, so far as may be necessary, requisite, and suitable to enable the ultimate creation of a state or states of the union, which shall embrace the lands within said territory. The consent to allotment expressed by Congress in section 15 was necessary, because under the grants conveying these lands to the tribes, they could only be held by the Indians in their tribal capacity until such time as Congress should consent to a different holding. Sections 15 and 16 should be construed together. The purpose of Congress, as repeatedly expressed in this act, was to make an equitable division of the tribal or communal property both personal and real, among the individual members of the tribes, to the end that a state might be formed. To do this, the title had to be changed from tribal to individual, and Congress cleared the way for such distribution of property by consenting thereto. The tribes were then free to make such division, should they desire to do so, and it was the office of the Commission to endeavor to procure their consent to do so. The mo-

ive of Congress was to secure ultimate statehood, of which state the Indians should be citizens. It is of course presumed that Congress in his legislation had in view what it conceived to be the greatest good to all concerned. It was not disposed to force statehood upon these people, even if it could have done so. But it could and did take the lead in two very important steps, looking to statehood, that of consenting to allotment and extending to allottees the privileges and immunities of United States citizenship. This was in 1893. It is now a matter of common knowledge that the Commission experienced many difficulties in reaching agreements with the tribes and much delay followed. It developed that it had a work of much more magnitude than had first been contemplated, and, from time to time, Congress enlarged its scope, and by successive acts provided more in detail for the accomplishment of allotment and division of the 204 lands. In 1901, its work was still unfinished; in fact, it was then just well begun. As yet but few of the Indians had taken their allotments, and as these were not taken under the scheme provided by the act of 1893, it is doubtful whether they thus became citizens. By act of Congress of March 3, 1901, 31 Stat. 1447, section 6 of the general allotment act of 1887 was amended by inserting the words "and every Indian in Indian Territory." So that the portion of the act relating to citizenship read "and every Indian born within the Territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians herein, and has adopted the habits of civilized life, and every Indian in Indian Territory, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Section 8 of the Act of 1887 as originally passed, read as follows: "That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies, and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order." Kappler's Laws, Vol. 1, 35.

It is contended that the amendment of 1901 made the act ambiguous and contradictory. It must be presumed that Congress had in mind all the terms of the act that was amended. It is clear that Congress meant to say and did say by the Amendment "every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens * * * without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The language is clear, and its intent and meaning cannot well be mistaken, and if in the other parts of the act as originally passed there are found provisions in conflict with the clear purpose
205 and intent of the amendment, they are in my judgment, so far as they conflict with the amendment, repealed by implication; but attention is called to the fact that section 6 was again amended by the act of May 8, 1906, 34 Stat. 182. It is clear that the main purpose of this amendment was to provide that the allottee under the general allotment act of 1887 should not become a citizen of the United States upon delivery of the trust patent, but that such citizenship should be deferred until delivery of patent in fee simple. It is also observed that the words "and every Indian in Indian Territory," constituting the amendment of 1901, are omitted, and the section as amended is made to include this provision, "and provided, further, that the provisions of this act shall not extend to any Indians in the Indian Territory."

At the same session and only a few days before Congress had passed an act providing for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory, and was then considering the Oklahoma Enabling Act, which was passed shortly afterwards. It was natural, therefore, that having specially legislated for the Five Civilized Tribes, they should in amending this general allotment act exclude therefrom all reference thereto. But the status of United States citizenship had attached to the individuals of the Five Civilized Tribes by the amendment of 1901. Without determining whether Congress could, without the consent of a citizen of the United States and without any act on his part forfeiting the same, withdraw such citizenship, it will not be presumed that Congress even intends to do so, except where such interest is expressed in clear and unmistakable terms, and, in my judgment, the amendment of 1906 does not admit of such construction.

On June 16, 1906, Congress passed the Oklahoma Enabling Act, in the preamble of which it is described as "An act to enable the people of Oklahoma and the Indian Territory to frame a constitution and state government, and be admitted into the Union on an equal footing with the original states."

In this act it was further provided "that the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided." And in that act it was further provided:

That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory and Oklahoma, and
206 who have resided within the limits of said proposed state for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed state; and all persons qualified to vote for said delegates shall be eligible to serve as delegates."

Whether the Indians of the Five Civilized Tribes at the time of the passing of the Enabling act were citizens of the United States or not,

its terms clearly make them electors and give them the right to participate in the formation of the state constitution and state government, if they were inhabitants of the area in the proposed state, and are members of Indian nations or tribes. In fact, several of them were members of the Constitutional Convention. The constitution framed pursuant to the Enabling act provides that the qualified electors of the state shall be male citizens of the United States, male citizens of the State, and male persons of Indian descent, native of the United States, who are over the age of 21 years, etc. Upon submission of the constitution, as provided in the Enabling act, the President of the United States proclaimed statehood. The members of the Five Civilized tribes participated in all state, county and municipal elections; hold state and county offices; a member of the Chickasaw nation is now a representative in Congress, and a member of the Cherokee nation is now a United States senator from Oklahoma. In *Boyd vs. Thayer*, 143 U. S. 170, it is said:

"Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafter be controlled, and it also involves the adoption as citizens of the United States of those whom Congress makes members of the political community; and who are recognized as such in the formation of the new state with the consent of Congress."

In my judgment, therefore, the members of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges and immunities of citizenship. I am not unmindful of the fact that Congress by joint resolution of March 2, 1906, continued the tribal governments "in full force and effect for all purposes under existing laws, until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members." And that by act of Congress approved April 26, 1906, tribal existence was continued in full force and effect for all purposes authorized by law until otherwise provided by law."

But by various and successive acts of Congress these tribes have been shorn of their governmental functions; their courts have
207 long been abolished; their principal chief, or governor, as the case may be, is subject to removal by the President, who may fill the vacancy by appointment. Provision is made that their public school system shall be superseded by the state public school system; tribal tax is abolished; provision is made for the sale of their public buildings and lands; their legislature shall not be in session for a longer period in any one year than thirty days, and no act, ordinance, or resolution thereof except resolutions of adjournment, are valid without approval by the President. In *Buster vs. Wright*, 135 Fed. 951, Judge Sanborn said:

"Between the years 1888 and 1901, the United States, by various acts of Congress deprived this tribe (Creeks) of all its judicial power and curtailed its remaining authority until its powers of government have become the merest shadows of their former selves."

So it is with all the Five Civilized Tribes; but there is still undistributed tribal property, and until this is divided, it is essen-

tial that the tribal entity shall be maintained. In my judgment, the existence of this undistributed tribal property was the main reason for continuing the tribal existence, and such must have been the principal motive actuating Congress when the resolution of March 2, 1906, was passed, providing for the continuance of tribal existence "until all property of such tribe, or the proceeds thereof, shall be distributed among the individual members of said tribes." It is a continuance of the tribe in mere legal effect, just as in many states corporations are continued as legal entities after they have ceased to do business, and are practically dissolved, for the purpose of winding up their affairs. It is not in my judgment a tribal existence incompatible with the enjoyment of full citizenship in the United States by the members of the tribes. Nor does the fact that these Indians have had restrictions upon alienation imposed upon their allotments necessarily affect their political status as United States Citizens. In *Re Heff*, 197 U. S. 508.

Can the right to maintain these suits be based upon treaty provisions relating to the protection of these Indians in their possession of the lands originally granted to the tribes? The grants of land made under the act of Congress of May 28, 1830, (4 Stats., 411) and the treaties entered into pursuant thereof, were to the tribes as such, and not to the individual members. This is clear from the fact, as we have seen, that it was then contemplated that these lands were so remote that they would never be desired for white settlement. It was then the policy of the government
208 to perpetuate the existence of the tribe, and there was no thought of tribal dissolution and the individual holding of the land. The Guarantees in the treaties related to tribal protection, and in my judgment cannot be invoked by the individual allottee under the changed conditions now existing. They imposed no duty or obligation upon the United States upon which these suits may be based.

The trust relation of the government recognized in *Beck vs. Flournoy Co.*, 65 Fed. 30, and kindred cases, known as the Flournoy cases, as arising from the fact that the legal title to the lands there involved was still retained in the government, does not exist here. It is alleged that by reason of the duties, obligations, and rights of the government, as set forth in this bill, the government is charged with the duty of protecting in the Courts the rights of the said tribes and members thereof, and in their behalf is charged with a trust of a high and delicate character. This is but a repetition of the allegations of guardianship, and we have now to consider whether in view of existing legislation and the present status of the individual allottee of either of the Five Civilized Tribes, these suits may be maintained by the United States as guardian for the Indian, acting in his stead, and without making him a party.

Does the relationship of guardian and ward now exist between the United States and the allottee with reference to his restricted land, in the sense originally recognized between the United States and the tribe and members thereof with reference to tribal property? The theory upon which this relation of guardianship arose

and was recognized for so many years is well stated in the United States vs. Kagama, 118 U. S., at page 383, et seq., as follows:

"These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owed no allegiance to the States, and received from them then no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. * * *

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

It is evident the court has in mind the tribal Indians, "communities dependent upon the United States. Dependent largely for their daily food. Dependent for political rights. They owed no allegiance to the States, and received from them no protection." To this class of Indians the court say there arises the duty of protection, and with it the power. Congress and the courts have long recognized the relation of guardianship in such case, and such a relation was recognized as existing over the Five Civilized Tribes before the allotment, and in my judgment so exists now, with reference to tribal property. *Choctaw Nation vs. United States*, 119 U. S. 1.

The relation of guardianship is not established by Congress expressly saying in any particular act, "the United States is hereby declared to be the guardian of the Indians," but was deduced by the courts from a consideration of natural conditions and constitutional and legislative provisions, as being that most nearly approaching the peculiar relation existing between the United States and the Indian tribes when the matter was first presented for judicial consideration. (*Cherokee Nation vs. Ga.*, 5 Peters 1) and of course recognized as continuing so long as the conditions giving rise to it existed. But Congress may terminate this relation at any time. As said by Mr. Justice Brewer, in the *Heff* case, (197 U. S. 499):

"Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one sui juris. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the

power of the courts to overrule the judgment of Congress. It is true, there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear, the question is at an end."

Whether the relation is now terminated or materially changed by Congress, we are to determine from a consideration of recent
210 legislation and change wrought thereby. As the relation was not established by any express provision, neither is it necessary to its termination. These allottees are now citizens of the United States and citizens of the State of Oklahoma. (Slaughter House Cases 16 Wallace, 36). As such they have the right to make and enforce contracts; to sue; be parties; give evidence, and to inherit, purchase, lease, sell and convey property. Civil Rights Case 109 U. S. 1. The fact that the allottee holds land all or a part of which is alienable for a fixed period does not affect his civil or political status. In re Heff, supra. Nor does it follow that because as a citizen he may make contracts generally with reference to his property, that he may therefore dispose of restricted lands before the expiration of the restricted period. Flournoy cases, supra.

In 19th Opinions of Attorneys General, at page 232, Mr. Garland said of the effect of the general allotment act of 1887, whereby individual allottees were given the right of occupancy of separate tracts, the title to which the Governments held in trust for twenty-five years:

"In this new mode of life, the guardianship which heretofore has been exercised over the tribe is to be transferred to the individual allottees provided for in this act. * * * Prior to the issuing of the second patent, the United States is to act as trustee of the lands. This relation as to the lands is substituted for the guardianship heretofore exercised over the tribe."

United States vs. Dooley, 151 Fed. 697, was a recent case instituted in the United States circuit court, E. D. Washington, by the Government in its own behalf to cancel a deed made by Susan Swasey, an allottee holding a trust patent, to the other defendants, the Allottee, Susan Swasey, is made a party defendant. Concerning the relation of the allottee to the Government, the Court says.

"The contention that the relation of guardian and ward exists between the complainant and the allottee cannot be sustained, for the statute terminated that relation, at least in so far as it affects her personal acts and political status as an Indian. Such was the holding in the Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848. The argument that the same relations exist between the Government and the Indians since as before the passage of the act was answered by Mr. Justice Brewer in delivering the opinion of the court as follows: 'But the logic of this argument implies that
211 the United States can never release itself from the obligation of guardianship; that, so long as an individual is an Indian by descent, Congress, although it may have granted all the

rights, and privileges of national and therefore state citizenship, the benefits and burdens of the laws of the state, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the state, and release him from obligations of obedience thereto. Can it be that, because one has Indian and only Indian blood in his veins he is to be forever one of a special class over whom the general government may in its discretion assume the rights of guardianship which it had once abandoned, and this whether the state or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound.'

The right to maintain the suit must therefore rest upon other grounds [that] that of the relation of guardian and ward, but it does not follow that because such status has been abolished that the government is remediless. The authority rests upon another well defined principle. The complainant is still vested with the legal title to the land, etc."

In *Ex parte Savage*, 158 Fed., 205, Judge Pollock, of the Kansas District, said:

"Since the decision by the supreme court in the case in *Re Heff* * * * it cannot be doubted, I think, under act of Congress of February 8, 1887, * * * when Indians have been allotted in severalty and have received their patent, they are no longer wards of the government, but are citizens of the United States and of the state in which they reside, and are entitled to all the rights, guaranteed to citizens of such state."

In the act of 1887 not only were the allottees restricted from selling the lands but the legal title thereto was reserved in the United States during the restriction period. The allottees here involved are restricted from selling for a fixed period, but the title is not reserved. Certainly if in the former case the relation of guardian and ward does not exist, it does not in the latter, unless for some other reason. Had it been the desire of Congress and the Five Civilized Tribes that the trust relation provided in the general allotment act should prevail here, it could readily have been accomplished by providing that the title should be held in trust by the tribe for the restricted period, to be finally patented to the allottees free from incumbrance, etc. The trust relation of

212 the tribe and the unquestioned right of the government to control tribal property would, in my judgment, have entitled the United States to sue in behalf of the tribe to cancel any conveyance made by the allottee. This of course would have involved the continuation of the tribe in legal effect during the restriction period, or until other disposition of the trust was provided, and it is probable that if such a disposition of the matter was considered it was not adopted because of the desire to sooner abolish tribal existence. It is to be remembered that the act of 1893, 27 Stat. 645, contemplated the extinguishment of the title, either by cession to the United States or by allotment to the individual Indians. Had the former been done, then allotment could have been effected similar to that under the act of 1887; but this was not done.

The restrictions upon alienation were placed upon these lands for some purpose, however. Let us see what it was. In *Beck vs. Flournoy Company*, 65 Fed. 34, Judge Sanborn says:

"The motive that actuated the lawmaker in depriving the Indians of power of alienation is so obvious, and the language of the statute in that behalf is so plain as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians."

Speaking of restricted allotments, under the general act, Judge Phillips says, in *Goodrum vs. Buffalo*, 162 Fed. 817.

"Accordingly, while authorizing the allotments in severalty, Congress conceded the lands with a firm cable attached to hold them to the exclusive use and possession of the Indians without qualification, restricting the power of divesting themselves of the use and title until after the fixed period."

There are numerous cases holding that the attempted conveyance of restricted allotted land is void, and that the purchaser, even though he has paid the purchase price, does not secure even an equitable title, nor can title be built up by adverse possession, estoppel, or any statute of Limitations. *Clark vs. Akers*, 16 Kansas, 166. *Shelton vs. Donohoe*, 40 Kansas, 346. *Schrimpacker vs. Stockton*, 183 U. S. 295. *Beck vs. Flournoy Company*, 65 Fed., 20. *Harris vs. Hardridge*, 166 Fed. 109. *Goodrum vs. Buffalo*, 162 Fed. 817.

In the *Buffalo* case last cited, Judge Phillips says:

"There is but one opinion among the courts, with the single exception of the ruling in said United States Court of Indian Territory, as to the construction of such acts of Congress and patents made thereunder; and that is, that any and all schemes and devices resorted to for the purpose of acquiring title to the Indian allotments during the period of such limitation, are abortive. This for the palpable reason that it is a period of absolute disability on the part of the Indian to alienate his lands."

It follows that in any case wherein an allottee has been induced to dispose of any of his restricted land contrary to the laws under which it was set apart to him, he may, if the pretended purchaser has gone into possession, bring suit in ejectment and recover the same, and no rights accrue to the defendant in such cases by virtue of such transaction which he can interpose as a defense. If in such case the allottee is still in possession, he can successfully defend against a suit brought by such pretended purchaser to secure possession by virtue of such pretended conveyance. He can, in short, institute and maintain any action in relation to his restricted land, which any other citizen might prosecute in relation to real property, and no deed, mortgage, lease, contract of sale, power of attorney, or other instrument of conveyance made by such allottee regarding his restricted land, contrary to the tribal agreements and acts of Congress relating thereto, can be legally urged as a defense to such action. As said by Judge Phillips, in the *Buffalo* case, *supra*:

"It should be understood, once and for all, that no scheme or device, however ingenious or plausible, concocted by any person, can avail to divest the Indians of the Title to their allotted lands within the period of limitation prescribed by Congress."

Having given the allottee the right of citizenship and clothed him with these unusual safeguards against his improvidence, has Congress in addition thereto, by the mere fact of placing restrictions upon the alienation of the land, intended thereby to reserve to the United States the right to sue in its own name to set aside such illegal transaction, and recover for the allottee such restricted property?

If such a right is reserved to the Government, and we are correct in the conclusion that the allottee is a citizen and may also maintain an action for the same purpose, then we have an anomalous condition under which, while the Government suit is pending in this court, the allottee, who is not a party here, if he sees fit, may go into the State court and sue the same defendant for the same relief. What rule of law is there binding the allottee by the suit in this court, to which he is not a party, even though it be professedly for

his benefit? My attention is called to none, nor do I know of 214 any.

Suppose a final decree is rendered in this court against the Government, with regard to any particular allotment, and suppose thereafter the allottee proceeds to bring suit in his own name against the same defendant or defendants, for identically the same cause of action and seeking identically the same relief, can these defendants plead as a defense in that suit the decree rendered here in a case to which the allottee was not a party? It is certainly extremely doubtful. In my judgment, the purpose of Congress to establish such an extraordinary condition as this, must appear very plainly to warrant a court in arriving at such a conclusion. In the *United States vs. Payne Lumber Company*, 206 U. S., at page 473, it is said:

"The restraint upon alienation must not be exaggerated. It does not of itself divest the right below a fee."

It must be borne in mind that the cardinal purpose of Congress was the creation of a state, of which the Indians were to be citizens. Continued guardianship of the Indians was incompatible with citizenship, national and state. In my judgment when Congress clothed the allottee with full citizenship and to provide against his improvidence, vested in him title to his alienable land, so that no scheme nor device, however ingenious, could divest him thereof, it did so for the very reason that in carrying out the original plan of statehood, which was to include the Indian, his status as ward of the Government was not in the nature of things compatible with full citizenship in the state and union, and that it was not intended by Congress that the guardianship should longer continue.

(*United States vs. Auger*, 153 Fed. 671.)

By this I do not mean to say that Congress may not make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if statehood had not ensued, for it reserved that right in the enabling act. But we are not now concerned with

what Congress may do, but what it has done. I am not unmindful of the Act of March 3, 1905, and subsequent acts relative thereto. By the act of March 3, 1905, (33 Stat., Part 1, 1060) it is provided:

"It shall be the duty of the Secretary of the Interior to investigate, or cause to be investigated, any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the

Five Civilized Tribes, and he shall in any such case where in
215 his opinion the evidence warrants it, refer the matter to the

Attorney General for suit in the proper United States Court to cancel the same, and in all cases where it may appear to the court that any lease was obtained by fraud or in violation of such agreements, judgment shall be rendered, cancelling the same upon such terms and conditions as equity may prescribe, and it shall be allowable where all parties [—] interest consent thereto to modify any lease and to continue the same as modified; Provided, no lease made by any administrator, executor, guardian, or curator which has been investigated by and has received the approval of the United States Court having jurisdiction of the proceeding shall be subject to suit or proceeding by the Secretary of the Interior or Attorney-General".

The act of March 1, 1909 (34 Stat., Part 1, 1026), contains this provision:

"To enable the Secretary of the Interior to investigate or cause to be investigated any lease of allotted land in the Indian Territory which he has reason to believe has been obtained by fraud or in violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the Act approved March third, nineteen hundred and five, ten thousand dollars."

The act of April 30, 1909, (Indian Appropriation Act), also provides:

"To enable the Secretary of the Interior to investigate or cause to be investigated any lease, power of attorney, contract, deed, or agreement to sell any allotted land which he has reason to believe has been obtained by fraud, or in violation of the terms of existing agreements with any of the Five Civilized Tribes, as provided by the Act approved March third, nineteen hundred and five, ten thousand dollars."

This act is a legislative declaration that in 1905, before it was passed, no duty devolved upon the Secretary to supervise the allottee in the leasing of his land, except where the law specially provided that such lease should be subject to his approval. In *Beck vs. Flournev Company*, *supra*, Judge Thayer said:

"It is manifest that the amendment in question, authorizing allotted land to be leased in certain cases under the direction of the Secretary of the Interior, was unnecessary if power to execute leases of allotted lands had already been conferred by previous enactments or treaty stipulation. The last mentioned act, therefore, is a legislative
216 declaration that Congress did not intend by any previous statute to authorize the leasing of any lands that might be assigned to Indians to be held by them in severalty."

But the Secretary of the Interior is charged with the supervision

of all Indian Matters wherein the government still retains guardianship, and this duty would have existed without legislation, if at that time the government still retained the guardianship of the allottee with regard to the land covered by the lease referred to.

It is noted further that the matter is to be referred to the Attorney General for suit in the proper United States Court, and in the proviso they are referred to as suits or proceedings by the Secretary of the Interior or the Attorney General. Whatever may have been the status of the allottee in 1905, it is clear that in a suit now instituted under this provision to cancel or modify a lease, the allottee is a necessary party. First: Because he is one of the main parties in interest and for reasons heretofore adverted to, is necessary to a complete determination of the controversy. And, Second: Because as one of the parties in interest his consent to any modification of the lease as provided for is necessary.

While the appropriation of April 30, 1908 is made to cover investigation by the Secretary of powers of attorney, deeds, or agreements to sell any allotted land, in addition to the leases, provided for in the original act and other appropriation acts, the act refers in terms to the original act, which provides only for suits by the Attorney General regarding leases. There is nothing in this legislation which, in any judgment, authorizes the government to maintain the suits at bar independent of the allottee and without making him a party. It follows that in the present bills is a defect of parties.

It is urged that even though the complainant may have the capacity to maintain these suits, the bills are subject to the objection of multifariousness, because numerous defendants are joined in each bill, for the reason that they are alleged to be connected with many distinct transactions regarding as many distinct tracts of land.

A bill is said to be multifarious when it improperly joins distinct and independent matters and thereby confounds them, as for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant. Or the demand of several matters of a distinct and independent nature against several defendants in the same bill. Words and Phrases, Vol. 5, P. 4615.

In *Barcus vs. Gates*, 89 Fed., 783, it is said:

17 "Multifariousness arises from the fact either that the transaction— which form the subject matter of the suit are so separate and dissimilar that they cannot conveniently be tried in one record, or that one defendant is able to say that as to a large number of the transactions set out in one bill he has no interest or connection whatever. A bill is not multifarious because there are several causes of action, if they occurred out of the same transaction, and if all the defendants are interested in the same rights and the relief against each is of the same general character, the bill may be sustained."

In *Hale vs. Allison*, 188 U. S., 56, the suit of [of] a receiver against numerous stockholders to enforce their liability, the Court approves and adopts the opinion of the District Judge McPherson, in the lower court. While that discusses the question of multiplicity of suits rather than multifariousness, the opinion is very pertinent to the situation here. In the course of the opinion, it is said:

"If, as is sure to happen, different defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. But even if the grounds of diminished trouble and expense may seem to be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the Court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many counsel will no doubt be concerned, whose conveniences must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of witnesses will not in any degree be diminished, and if some docket costs may be escaped, that is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill [ever] separate action at law."

Suppose the court were to retain jurisdiction of these bills and require that the allottees all be made parties, either as plaintiffs or defendants. The bill would then essentially involve a multitude of separate suits, each by an allottee, the main party in interest, as plaintiff, and one or more but not all of the defendants, as defendants.

I appreciate fully the motive of the pleaders who conceived that the government was the only necessary plaintiff, so that each bill would be merely the suit of one plaintiff against various defendants, and, conceiving that each bill involved practically but one question of law, in the determination of which all of the defendants were equally interested, deemed it most practical to institute one suit instead of many.

218-223 But to my mind these bills, viewed from any standpoint consistent with the facts and conditions involved, each essentially combine a multitude of separate and distinct plaintiffs against separate and distinct defendants, and are subject to the objection of multifariousness.

There are other grounds of objection raised by the demurrer not necessary now to consider. For the reasons set forth in this opinion, the demurrers, in my judgment should be sustained, and the bills dismissed.

It is so ordered.

(Signed)

RALPH E. CAMPBELL, *Judge*.

Muskogee, Oklahoma, August 6, 1909.

Endorsed as follows: In the United States Circuit Court for the Eastern District of Oklahoma. The United States of America, Complainant, vs. James P. Allen, et al., Defendants. No. 284 and Similar Cases. Opinion Sustaining Demurrers. Filed Aug. 6, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

* * * * *

224 The following decree and order was then entered in said causes:

In the United States Circuit Court for the Eastern District of
Oklahoma.

In Equity. No. 340.

UNITED STATES OF AMERICA, Complainant,

vs.

G. L. MERRIMAN et al., Respondents.

Decree.

On this, thirteenth day of September, 1909, on consideration of the demurrers to this bill filed by the various defendants herein, which were heretofore argued and submitted and by the Court taken under advisement, the Court now finds that the complainant has not such an interest in the matters involved in this cause as entitled it to maintain this action; that the various allottees and patentees of the lands involved in this action are necessary parties thereto, and that there is, therefore, a defect of parties; and that the bill is multifarious.

It is the judgment of the Court that for the foregoing reasons the demurrers should be sustained.

It is therefore ordered, that the demurrers herein, now being considered, be sustained, and the bill dismissed at the complainant's costs.

RALPH E. CAMPBELL, *Judge.*

Endorsed as follows: No. 340. The United States vs. G. L. Merri-
man et al. Decree and order. Filed in open Court Sept. 13, 1909.
L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

225

(i.)

Prayer for Appeal.

Thereupon the complainant prayed an appeal in open Court, and that the Clerk be ordered to prepare and authenticate a transcript of the record, which said prayer for appeal and order are in words and figures as follows:

In the United States Circuit Court for the Eastern District of
Oklahoma.

In Equity. No. 340.

THE UNITED STATES OF AMERICA, Complainant,

vs.

G. L. MERRIMAN et al., Respondents.

Petition for Allowance of Appeal.

To the Honorable Ralph E. Campbell, Judge of said Court:

Comes now the above named complainant, by its solicitors, and considering itself aggrieved by the decree and order made and en-

tered in this cause on the thirteenth day of September, 1909, does hereby appeal from said decree and order to the United States Circuit Court of Apppals for the Eighth Circuit, for the reasons specified in the assignment of error, which is filed herewith, and prays that its appeal be allowed, and that a transcript of the record proceedings and papers upon which said decree was based, duly authenticated and consisting of:

First. The bill of Complainant, except such transactions in Paragraph Six thereof, as to which special orders of dismissal have been heretofore entered on petition of complainant.

Second. One copy each of the different demurrers filed herein;

Third. Final Decree and Order;

Fourth. All endrosemments of filings of documents above specified;

Fifth. Copy of Appeal and Assignment of Error;

Sixth. Copy of order allowing the same.

Eighth. The Opinion of the Court;

may be prepared by the Clerk, and transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

THE UNITED STATES OF AMERICA,
By GEO. W. WICKERSHAM,

Attorney-General,

By A. N. FROST,

Special Assistant to Attorney General.

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(j.)

Allowance of Appeal.

Thereupon the Court allowed said appeal, and ordered the Clerk to prepare and authenticate a transcript of the record, as prayed for. Said allowance and order are in words and figures as follows:

Equity. No. 340.

THE UNITED STATES
vs.

G. L. MERRIMAN et al.

The foregoing petition for allowance of appeal is granted, and the appeal allowed, and the Clerk is instructed to make and authenticate the record, as above set forth.

Done this Sept. 28th, 1909.

RALPH E. CAMPBELL, *Judge.*

Endorsed as follows: No. 340. The United States, vs. G. L. Merriman et al. Petition for appeal and order. Filed in open Court Sept. 28, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

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(k.)

Assignment of Error.

Thereupon the complainant filed assignment of error, which said assignment of error is in words and figures as follows:

In the United States Circuit Court for the Eastern District of
Oklahoma.

In Equity. No. 340.

THE UNITED STATES OF AMERICA, Complainant,

vs.

G. L. MERRIMAN et al., Defendants.

Assignment of Error.

Comes now the complainant in the above entitled cause, by its solicitors, and files the following assignment of error upon which it will rely for grounds of reversal in its appeal from the order and decree made by this honorable court on the thirteenth day of September, 1909, in the above entitled cause:

That the court erred:

1.

In sustaining the demurrers filed herein, and ordering said cause dismissed.

2.

In holding that said cause could not be maintained in the name of the United States as sole complainant, for the reason that Congress has not so authorized, and for other reasons.

3.

In holding that the members of the Five Civilized Tribes are citizens of the United States.

4.

28 In holding that the allottees' personal status as citizens, and relation to the United States, are such that this suit cannot be maintained solely in the name of the United States, and that the guardianship of the United States is incompatible with such citizenship.

5.

In holding that the guaranty of the United States and its guardianship extends only to the Five Civilized Tribes, and not to the individual members thereof.

6.

In holding that a termination of the relationship of guardian is shown by the legislative enactment with reference to the disposition

of the affairs and property of the Five Civilized Tribes and its members, together with the alleged granting of citizenship.

7.

In holding that the restrictions placed on the alienation of the lands allotted to the members of the Five Civilized Tribes did not reserve to the United States the right to sue in its own name to set aside any transactions made in contravention of such laws against alienation, and to recover for the allottee his property so attempted to be alienated.

8.

In holding that there exists no duty, policy or power in the United States upon which can be predicated the right of the United States to maintain this cause in its own name.

9.

In holding that the allotment of the lands of the Five Civilized Tribes to its members, subject to certain restrictions, and the citizenship alleged to have been created, fulfilled any duty which may have existed in the United States to any of the citizens of the Five Civilized Tribes.

10.

In holding that the allottees are necessary parties to —.

11.

In holding that there is a defect of parties in said bill.

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12.

In holding that said bill is multifarious.

13.

In holding that there is a misjoin-er of causes of action in this bill.

14.

In holding that there is a misjoin-er of parties in this bill.

15.

In failing to hold that the Acts of Congress removing restrictions from the land of certain of the allottees of the Five Civilized Tribes did not affect the duty owed by the United States to secure the cancellation of any instruments attempting to convey the inalienable allotments of said allottees, and to restore to the said allottees the land so attempted to be conveyed while restricted, nor its right to bring an action in its own name as sole complainant for said purpose.

Sem. other than allottees.

16.

In failing to hold that the transactions set forth in paragraph six of the bill of complaint, being attempted conveyances by persons

other than allottees thereof of lands allotted to members of the Seminole Tribe of Indians, were illegal for the reason that said allotments, at the dates of the instruments complained of, were, and now are, inalienable, a right of occupancy only having been given to the allottees of the Seminole Nation of the lands allotted to them in severalty, and no patents having been issued to said allottees, as set forth in paragraph four of the bill of complaint, and for the further reason that the said attempted conveyances set forth in said paragraph six are of lands of allottees of said Nation, the alienation of which was at the date thereof expressly prohibited.

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17.

In failing to order that said attempted conveyances, as complained of, be cancelled, and possession of the lands involved therein given to the allottees thereof, and that the title of said allottees be quieted, and decreeing accordingly.

18.

In failing to rule that said demurrers should be overruled.

19.

In failing to decree that the United States, on the allegations of the bill, is properly the sole complainant, and entitled to the discovery and relief prayed for.

Wherefore; For these, and divers other errors appearing upon the record, the appellant prays that the decree and order herein be reversed, and that the United States Circuit Court of Appeals for the Eighth Circuit render such proper decrees and orders on the record as justice and equity demand.

THE UNITED STATES OF AMERICA,
By GEO. W. WICKERSHAM,

Attorney-General,

By A. N. FROST,

Special Assistant to Attorney-General.

Endorsed as follows: No. 340. The United States, vs. G. L. Meriman et al. Assignment of error. Filed in open Court Sept. 28, 1909. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla.

* * * * *

231a

Department of Justice.

Land Suits Five Civilized Tribes.

MUSKOGEE, OKLAHOMA, *October 1, 1910.*

DEAR SIR: You are hereby notified that on Monday October 17, 1910, at Saint Paul, Minnesota, I shall present a motion on behalf of the Appellant in the Land Suits, so called, a copy of which I enclose.

Yours truly,

A. N. FROST,

Special Assistant to the Attorney General.

231b In the United States Circuit Court of Appeals for the Eighth Circuit.

Nos. 3171 to 3280, Both Inclusive, Excepting Therefrom Nos. 3265, 3276 and 3279.

THE UNITED STATES OF AMERICA, Appellant,
vs.

ROBERT L. OWEN et al., GEORGE W. ADAMS et al., R. A. ROSS et al., C. C. McDonald et al., Nancy Bell et al., R. M. Cummings et al., H. West et al., J. M. Bruner et al., R. R. Hall et al., J. E. Arnold et al., Alvin F. Pyatt et al., W. E. Gilbert et al., Lewis T. Hine et al., T. A. Starrett et al., O. A. Simmons et al., J. R. Greenlees et al., W. L. Whittaker et al., Lina B. Darrough et al., J. F. Flipper et al., Robert M. Snyder et al., Perry McKay et al., William C. McAdoo et al., George Captain et al., E. B. Henshaw et al., W. A. Robinson et al., Hugh Simpson et al., C. E. Wilkins et al., G. M. D. Holford et al., W. H. Payne et al., M. B. Brundage et al., G. F. Deck et al., Guy P. Cobb et al., E. S. Potts et al., M. L. Weeks, Trustee, et al., B. S. Curtis et al., L. Fountain et al., James E. Whitehead et al., J. M. Hinkle, Jr., et al., Bird Ashton et al., A. H. Lee et al., A. J. Snider et al., H. O. Malot et al., P. M. Waltrip et al., Joseph Cordell et al., Frank G. Dale et al., Presley B. Cole et al., W. L. Thomas et al., W. S. Farmer et al., Joseph A. Bartles et al., Silas F. Huckleberry et al., A. B. Bradley et al., George R. Smith et al., J. L. Nelson et al., George R. Beeler et al., American Investment Company et al., I. A. Briggs et al., Cass M. Bradley et al., Patterson Mercantile Company et al., L. W. Cruce et al., Henry F. Cooper et al., John M. Jones et al., R. L. Williams et al., Ed Byrd et al., F. J. Bomstead et al., V. Bronaugh et al., Thomas J. Barber et al., J. C. Starr et al., J. S. Campbell et al., J. M. Bayless et al., Charles Patterson et al., John G. Lipe et al., Harry H. Rogers et al., Scott Yeatman et al., G. D. Sleeper et al., J. S. Mullen et al., J. A. Tippet et al., A. P. Brown et al., Samuel H. Davis et al., Stephen Gleese et al., S. Richards et al., M. B. Flesher et al., W. E. Martin et al., Mary C. Thompson et al., Robert L. Hall et al., J. W. Brown et al., J. H. Holland et al., J. C. Holman et al., Mary Kemp et al., L. C. Watkins et al., Fred H. Kellogg et al., H. A. Watson et al., G. T. Ledbetter et al., W. E. Washington et al., Charles O. Tate et al., O. L. Parsons et al., E. F. Jeffries et al., J. H. Threatt et al., Louis C. Parmenter et al., C. M. Rodman et al., T. T. Godfrey et al., H. A. Ingram et al., Andrew Reed et al., G. L. Merriman et al., James H. Cobb et al., G. R. Rock et al.

Motion.

231c Comes now the Appellant in the above entitled causes, by its solicitors and says: That causes No. 3150 to 3163 both inclusive, and 3265, 3276 and 3279, being the United States of Amer-

ica Appellant v. several defendants were, on December 6, 1909, submitted upon brief and argument of counsel; that later, to wit: On the 18th day of January 1910, certain stipulations were filed herein, signed by the solicitors for the Appellant and a majority of counsel for Appellees, agreeing that whatever decision should be rendered in the causes heard as above might be rendered herein, and that they might be passed generally pending such decision, that on said date an order was made by this Honorable Court for a general continuance and that in numbers 3188, 3189, 3223, 3236, 3237, 3238, 3264 and 3277. Deming Investment Company, Midwest Land Company, B. F. Whitehill, R. S. Allen and Peck, Yates and Lockett, Special defendants, counsel therefor should be allowed opportunity to present any question involved therein not theretofore presented, after the rendition of the decision in the causes theretofore heard; that such decision has been rendered reversing the decision of the Circuit Court for the Eastern District of Oklahoma and remanding the same to said Trial Court with instructions to over-rule the demurrers filed therein.

Wherefore, The Appellant moves that the causes herein may be considered as before this Honorable Court; that said order heretofore entered may be vacated and that the same decree and order heretofore entered in numbers 3150 to 3163 both inclusive and 3265, 3276 and 3279 may be entered in these to wit: That the decree of the Circuit Court for the Eastern District of Oklahoma therein be reversed and that they be remanded thereto with instructions to over-rule the demurrers filed therein.

UNITED STATES OF AMERICA,
By GEORGE W. WICKERSHAM,
Attorney General;
By A. N. FROST,
Special Assistant to the Attorney General.

231d (Endorsed:) No. 3172. The United States, Appellant, vs. Robert L. Owen, et al., and cases Nos. 3173 to 3280, inclusive, except Nos. 3265, 3276 and 3279. Motion of Appellant for order vacating continuance and for entry of decree of reversal, etc., Filed Oct. 17, 1910, John D. Jordan, Clerk.

231e United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains a full, true and complete copy of the Motion of Appellant for an Order vacating continuance and for entry of Decree of reversal, etc., in case No. 3172. The United States, Appellant, vs. Robert L. Owen, et al., and cases Nos. 3170 to 3280, inclusive, except Nos. 3265, 3276 and 3279, as full, true and complete as the original of the same remains on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this eighteenth day of February, A. D. 1911.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. No. 3172. The United States, Appellant, vs. Robert L. Owen, et al. and cases Nos. 3173 to 3280, inclusive, except Nos. 3265, 3276 and 3279. Certified copy of Motion of Appellant for order vacating continuance and for entry of decree of reversal, etc.

231f United States Circuit Court of Appeals, Eighth Circuit,
May Term, A. D. 1910.

No. 3150.—United States, Appellant, vs. James P. Allen et al.

No. 3151.—United States, Appellant, vs. N. E. Patterson et al.

No. 3152.—United States, Appellant, vs. Charles E. McPherrren
et al.

No. 3153.—United States, Appellant, vs. F. B. Severs et al.

No. 3154.—United States, Appellant, vs. Wilson Bruton et al.

No. 3155.—United States, Appellant, vs. Norman Pruitt et al.

No. 3156.—United States, Appellant, vs. James Jefferson et al.

No. 3157.—United States, Appellant, vs. J. J. Creamer et al.

No. 3158.—United States, Appellant, vs. Filix R. Phillips et al.

No. 3159.—United States, Appellant, vs. J. M. Dickenson et al.

No. 3160.—United States, Appellant, vs. James P. Allen et al.

No. 3161.—United States, Appellant, vs. Walter F. Nichols et al.

No. 3162.—United States, Appellant, vs. John F. McClellan et al.

No. 3163.—United States, Appellant, vs. Alfred F. Goat et al.

No. 3265.—United States, Appellant, vs. George C. Crump et al.

No. 3276.—United States, Appellant, vs. C. J. Benson et al.

No. 3279.—United States, Appellant, vs. J. O. Davis et al.

Appeals from the Circuit Court of the United States for the Eastern
District of Oklahoma.

Mr. Charles W. Russell, Assistant Attorney General, for Appellant.

Mr. S. T. Bledsoe, Mr. George S. Ramsey, Mr. B. B. Blakeney, Mr. James E. Humphrey, Mr. Joseph C. Stone and Mr. Robert L. Owen, pro se, (Mr. A. W. Clapp, Mr. O. L. Rider, Mr. Kenneth S. Muchison, Mr. Wm. M. Matthews, Mr. C. L. Thomas, Mr. N. A. Gibson, Mr. Robert J. Boone, Mr. George C. Buttz, Mr. Garfield Johnson, Mr. T. S. Cobb, Messrs. Crump, Rogers & Harris, Messrs. Willmott & Wilhoit, Mr. W. L. McCann, Mr. Thomas H. Owen, Mr. W. B. Crossan, and Messrs. Davis & Davis were with them on the briefs) for Appellees.

231g Before Hook and Adams, Circuit Judges, and Amidon, District Judge.

AMIDON, *District Judge*, delivered the opinion of the Court.

The lands of the five civilized tribes were allotted in severalty to their members, subject to express restrictions against their alienation for specified periods of time. The bills in these suits charge that many thousand conveyances have been made in violation of those restrictions, and the suits have been brought by the United States to have some four thousand of these conveyances declared to be void and cancelled of record. The restrictions against alienation arise out of numerous statutes and treaties, and vary according to such matters as the amount of Indian blood of the allottee, whether the land was a homestead, and whether it was held as an original allotment or by inheritance. The grantees under the conveyances are classified according to some distinct feature of the restriction upon alienation, and all grantees coming under each class are combined as defendants in a single suit. The allottees are not made parties either as plaintiff or defendants, and it is not charged in the bills that the conveyances were obtained by fraud, misrepresentation, or for an inadequate consideration. They are assailed solely upon the ground that they were made in violation of the restriction which Congress imposed upon the alienation of the allotments.

These bills were demurred to upon numerous grounds. The demurrers were sustained by the trial court for the reason (1) that the complainant has not such an interest in the matters involved as entitles it to maintain the action; (2) that the allottees are necessary parties, and that there is therefore a defect of parties; (3) that the bills are multifarious. A decree was entered in each case dismissing the bill upon the merits, to review which is the object of this appeal.

The consideration of the case will be simplified if it is understood at the outset that the plan of the government in dissolving the five civilized nations and distributing their lands in severalty, was not simply a real estate transaction. It was a great governmental project, having for its object the social and industrial elevation of the Indians. For the accomplishment of that result there were two main reliances: (1) the added incentive which comes from

the individual ownership of property as distinguished from its joint or tribal ownership; (2) the continuance of that ownership for such a period as should bring the Indian into a state where he could safely be trusted to protect his interests in the sharp competition with members of the white race. During all the years that this scheme was in process of execution, the Indian lands, like the Indians themselves, were subject to the supreme authority of the national government. The United States proceeded, in so far as it 231h could, with the consent of the Indians. That, however, it did as a matter of wise governmental policy, and not in obedience to any constitutional restriction. Whenever it encountered the obstinate opposition of the Indians to its plans, it did not hesitate to set aside their will and substitute its own authority. The title to these lands was in the Indian tribes, and the formal conveyances to the individual members were made by tribal officers. All this, however, was done in obedience to the regulations of the national government. To attempt to cramp these large governmental measures to the narrow limits of a real estate transaction is to deprive them of their distinctive character. And yet much of the argument contained in the briefs, as well as the opinion of the trial court, treats these measures as a matter between grantor and grantee, and wherever they do not fit the private law of real property, they are declared to be ineffective.

The same observations may be made as to the statement of the relation between the national government and the Indians being that of guardian and ward. These are familiar terms in decisions dealing with Indian matters. They are however, words of illustration, and not of definition, and to attempt to reason from the private law of guardian and ward to the measures of the federal government in dealing with the five civilized tribes, leads only to confusion and the subversion of the real scheme of government.

Turning now to the objections which were made and sustained by the trial court, has the federal government such an interest as entitles it to maintain these suits? It will be conceded at the outset that it has no legal or equitable estate in the allotments; and if such an estate is necessary, it has no standing in court. It is, however, too plain for controversy, that the federal government imposed restrictions upon the alienation of these allotments. That restriction was its main reliance for the social and industrial elevation of the Indians. Has it a standing in Court for the enforcement of its policy? To say that it has not is to make the restraints upon alienation a mere *brutum fulmen*. Shall the Indians who are intended to be restrained, be made the sole agency for the enforcement of the restraint? If so, the act of Congress is nothing more than a benevolent admonition. If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a vio-

lation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation a pauperized, discontented and, possibly, belligerent people. To prevent such results the United States may invoke the aid of its courts. That question was put to rest in the decision of *In re Debbs*, 158 U. S., 564. When a suit in equity is an appropriate method for the enforcement of a governmental policy, the national government may maintain such a suit. The present case presents a right of the nation which has been violated and cannot be redressed in any other way than by a suit in equity.

If its interest in its measures does not give it a standing in court, then the violation of those measures must go wholly without redress. Governmental action cannot be thus paralyzed. If the aid of the court is an appropriate remedy, the government has the same right to proceed in that manner that it has to use executive power where that power is an appropriate agency for the accomplishment of its purposes.

The Supreme Court of the United States in the case which carried the emancipation of the Indians and their property to the fullest extent, expressly recognizes the right of the government to enforce, by appropriate action in court, the restraints which it imposed upon the alienation of Indian allotments. The court says in the *Heff* case, 197 U. S., 489, 509: "Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a National or state court. * * * Many a tract of land is conveyed with conditions subsequent. A minor may not alienate his lands; and the proper tribunal may at the instance of the rightful party enforce all restraints upon alienation."

Under the general allotment act of 1887, a provisional patent was issued to the allottee, and the naked legal title retained in the government for the period of twenty-five years. In the case of the five civilized tribes, this plan was modified to the extent of granting the legal title to the Indian, but imposing upon it a restraint against alienation. These plans present simply differences of method. The object sought in each case was the same, namely, to clothe the Indian with such title to the property as seemed best calculated to encourage his industrial development, and yet accompany this grant with such a restriction as would prevent the main reliance of the government for the industrial betterment of the Indian from being defeated by the alienation of the property. The right of the government to invoke the aid of its court to prevent the defeat of its object is the same under the one statute as the other. Its right to maintain a suit to prevent the defeat of its allotment scheme under the general law of 1887, is fully sustained in *United States v. Rickert*, 188 U. S., 432. It is contended, however, in the present case, that that decision is not controlling because there the government held the legal title

to the property for a period of 25 years in trust for the Indian, but subject to a restraint upon alienation, whereas here the legal title has been conveyed to the Indian. The decision in the Rickert case does not rest upon a principle of the law of real property but upon the power of the nation to enforce its own measures. At page 444 of the opinion the right of the government to maintain the suit is declared to rest, not upon the fact that it held the title to the property, but, to use the language of the court, upon "the injurious effect of the assessment and taxation complained of upon the 231j plans of the government with reference to the Indians." In either case it is not a right of property which is enforced, but a plan of government. The Supreme Court there declares the right of the nation to maintain a suit for the enforcement of its policy in regard to Indian allotments to be too plain for argument. 188 U. S., 444. This statement is approved in *McKay v. Kalyton*, 204 U. S., 458, 467.

But we are not left to inference from the general scheme of the national government in its dealings with the five civilized tribes, to find authority for the maintenance of these suits. They are authorized by express act of Congress. The last paragraph of Section 6 of the Act of May 27, 1908 (35 Stat. at Large, 312), is a saving clause. Viewed solely in that light it declares the belief and intent of Congress that the rights which it saves, exist. It does not, however, stop with the language which saves the rights specified, but proceeds to declare the conditions upon which those rights shall be exercised by stating that the suits shall be brought upon the recommendation of the secretary of the interior, and without cost to the allottees. It thus passes beyond the scope of a saving clause, and uses language which is consistent only with the grant of the power to institute the suits. When this language is read in connection with the earlier part of the section appropriating \$50,000 to cover the expenses incurred by the attorney general in this litigation, the intent of Congress that the power to maintain the suits is granted, and its purpose that such suits should be instituted in proper cases, is clearly manifest. It is incredible that the purpose of Congress was simply to provide for the institution of suits to obtain a judicial determination as to whether the power of the government to maintain such suits existed. Congress, by its own declaration, could have placed that question beyond controversy, and the courts ought not to give a meaning to its acts which would make of them a mere squandering of public funds. That which is implied is as much a part of a statute as that which is expressed. *City of Little Rock v. U. S.*, 103 Fed., 418; *United States v. Babbitt*, 1 Black, 55. Implications far less clear than the power to maintain these suits, have been enforced by the courts. *Gelpeke v. City of Dubuque*, 1 Wall., 220; *Postmaster General v. Early*, 12 Wheaton, 135, 146; *Telegraph Company v. Eyser*, 19 Wall., 419; *Great Northern Railway Co. v. United States*, 155 Fed., 945. The trial court held that, because a statute conferring the jurisdiction here in question by more direct language, was not enacted, though brought to the

attention of the committee having the present act in charge, that this amounted to an expression of the legislative intent that the right itself either did not exist or was so doubtful that the only proper procedure was to make provision for a judicial determination of its existence. Courts can find the intent of the legislature only in the acts which are in fact passed, and not in those which are never voted upon in Congress, but which are simply proposed in committee. It is not contended that the bill referred to was ever brought to a vote in Congress and rejected. It was simply one of the 231^k measures which was under consideration at the time the act of May 27, 1908, was passed. To hold that such facts can be looked to for the purpose of narrowing the effect of a statute actually passed would be to invent a new and dangerous canon of statutory interpretation.

Much of the briefs is devoted to arguments deduced solely from the fact that Congress has conferred national citizenship upon the Indians. These arguments have been frequently presented to the courts, but so far as we are aware, they have never defeated the exercise of national authority over the Indian except in the *Heff* case, 197 U. S., 488. That decision, however, as now explained by the Supreme Court in *United States v. Celestine*, 215 U. S., 278, lends no support to the defendants. The case arose under the general allotment act of 1887. That statute provides that, upon the completion of the allotments, the Indians "shall have the benefit of, and be subject to the laws, both civil and criminal, of the State." Mr. Justice Brewer carries this feature of the statute through his opinion at every step as the basis of the decision of the court. He has now removed all possible doubt on the subject by his opinion in the *Celestine* case, where he expressly states that the *Heff* opinion rests upon the fact that under the general allotment act Congress has, by direct provision, entirely renounced its own authority over the Indians, and subjected them to the laws of the state, both civil and criminal. The decision of the *Heff* case simply gives effect to this positive declaration of the legislative intent. In its dealings with the five civilized nations, Congress has been at great pains to indicate a different purpose. Here it has from time to time down to the organic act admitting Oklahoma, and the provisions which it insisted should be embodied in the constitution of that state, reserved to itself express authority to pass such laws with respect both to the Indians and their lands, as shall in its judgment seem wise. In the present case, though it conferred citizenship upon the Indians, it accompanied its grant of the allotments to them with an express provision against their alienation. The difference between the present case and the *Heff* case is this. In the former case Congress expressly renounced its own authority over the Indians, and subjected them to the laws, both civil and criminal, of the state. Here Congress, with equal explicitness, has imposed a restraint upon the alienation of allotments. It is as much the duty of the courts to give effect to the legislative intent in the present case as in the former. See also *U. S. v. Sutton*, 215 U. S., 291.

The grant of citizenship to the members of the Five Nations, was intended for their protection, and not to strip them of the protection of the national government. It was, in our judgment, never the intent of Congress to deprive itself of the authority which it had always exercised to adopt such measures as in its judgment were wise for the protection of the Indian in his rights among the more highly developed members of the white race. Conceding the Indians to be citizens of the United States and of the 2311 state of their residence, this court still said in the case of *United States v. Thurston County*, 143 Fed., 287, 288: "Their civil and political status, however, does not condition the power, authority or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. They are still members of their tribes and of an inferior and dependent race." Clothing them with citizenship did not change their character or invest them with full industrial capacity. These records are eloquent on that subject. An intent to destroy the authority of the national government to protect the Indian, ought not to be deduced as a mere speculative inference from the definition of citizenship. Such a radical change of national policy should emanate only from express and unequivocal language.

Section 1 of the act of May 27, 1908, removes all restraints upon alienation as to several classes of allotments. Section 6 of that act provides for the appointment of representatives of the secretary of the interior to counsel and advise Indian allottees having restricted lands, with reference to the same, and also authorizes these agents to bring suits in the name of the allottee to cancel and annul any conveyance or encumbrance thereof made in violation of any act of Congress. These provisions standing alone, would afford a strong implication against the right of the government to maintain these suits in its own name as to lands that are freed from restriction by section 1. The Indian as a citizen of the United States has a clear right to maintain any suit necessary to set aside illegal conveyances of his property. By Section 1 of the act he is vested in certain cases with an unrestricted right to dispose of his allotment. How can the Attorney General contend that as to lands thus freed from restriction by the government he is truthfully representing its present policy by prosecuting these suits in its name? Again, it might well be urged that, inasmuch as Congress has authorized the agents of the secretary of the interior to maintain suits in the name of allottees to cancel any instrument executed in violation of law, it has thereby indicated its intent that no other governmental agency should institute such suits. These contentions, in our judgment, would be controlling were it not for the last paragraph of Section 6 of the act. It reads as follows:

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit, and the prosecution and appeal

thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof."

231*m* "Nothing in this act" includes the provisions from which the implication is drawn against the right of the government to maintain these suits. The later language of the paragraph extends that right to all conveyances which "have been made contrary to law with respect to said lands prior to the removal therefrom of restrictions upon the alienation thereof." According to the averments of the bills, every conveyance here involved falls clearly within these words. To deny the right of the government to maintain these suits is to repudicate the plain language and manifest object of the paragraph which we have quoted. The Indians and their lands were subject to the supervision of the secretary of the interior, and the act provides that the suits shall only be brought on his recommendation. The power of Congress to confer such an authority is beyond question. Whether the suits should be brought presents a question of administrative rather than judicial discretion. If Congress saw fit to reinvest allottees with a clear title to their allotments before freeing them from restraint by section 1 of the act, that is clearly a subject with whose wisdom the courts cannot interfere. It is our duty to give effect to the intent of Congress as declared by the statute. The Supreme Court in the case of *United States v. Celestine*, 215 U. S., 278, again enforces the duty of the courts to construe legislation of Congress in relation to the Indians so as to promote their interest. Applying that canon, we entertain no doubt of the right of the government to maintain these suits. They are brought in the name of the United States to enforce a right created by federal law. The jurisdiction of the Circuit Court is therefore plain.

Is there a defect of parties? The rule as to parties in equity was early stated by Mr. Justice Curtis in language so accurate and comprehensive that it has since been accepted by all federal courts. He says that parties are: "1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, 17 How., 129, 139.

The Supreme Court in *Waterman v. Canal Louisiana Bank Co.*, 215 U. S., 33, 49, after quoting the above language with approval, condenses the rule as to indispensable parties as follows: "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between 231ⁿ the parties actually before the court, without injuriously affecting the rights of such absent party." That is the real ground of the decision of the Supreme Court in *Minnesota v. Northern Securities Company*, 184 U. S., 199. The decree there could not be enforced against the Northern Securities Company without destroying the rights of the Northern Pacific and Great Northern Railroad Companies, and their stockholders, who were not parties. See also *Rogers v. Penobscott Mining Co.*, 154 Fed., 615. The allottees in the present case do not come within the class of indispensable parties as thus defined. The cause of action set up in the bill is not theirs but the government's. True, if the government succeeds their titles will be cleared of clouds; but if it does not succeed, they will be left with their personal causes of action unaffected by what is done in the present litigation. It may be said that this very fact makes the presence of the allottees necessary to complete justice to the defendants. While the measure of justice in their favor would be more complete if the allottees were present, that fact does not render the allottees indispensable parties. It is not the mere convenience of the parties before the court which renders absent parties indispensable, but the protection of the rights of those absent parties. Looking at the entire litigation, justice to the defendants will also be promoted by this practice. The Indians have already parted with their lands by deed. While they have the legal right to assail the conveyances if they were made in violation of the statute against alienation, the exercise of that right by the Indians after a decision against the government in the present suit, is so problematical that it would be oppressive to compel the plaintiff to bring all allottees before the court, and would also add unnecessarily to the costs of the defendants in case the suits shall go against them. Again, the allottees, if present, would have no control over the suits. Their consent to a judgment in favor of the defendants would not defeat the right of the government. In our judgment, therefore, there is no defect of parties.

The defense of multifariousness is without merit. That defense, as the Supreme Court has frequently declared, is "very largely a matter of convenience." *United States v. Bell Telephone Co.*, 128 U. S., 315, 352; *Graves v. Ashburton*, 215 U. S., 331, 335. It is addressed to the sound discretion of the court. The convenience both of the defendants and the government is conserved by joining in one action all such conveyances as the government claims are invalid because made in violation of a specific statute.

Only one question remains for consideration. The statutes imposing restraints upon alienation were changed from time to time between the year 1893, when the allotment of the lands in severalty began, and the time of their completion some fifteen years later. It is earnestly contended by the defendants that after allotments had

been made subject to a specific limitation, the government was without power to enlarge the period of that limitation; that the Indian obtained a vested right in his allotment, subject only to the restriction which was imposed upon it at the time the allotment was made, and that to enlarge the period of the restriction would be an impairment of his vested rights, in violation of the 14th Amendment to the Constitution. So long as the lands were held by the Indian allottee, or by an Indian who claimed under him by inheritance, we do not think this contention is sound. The grant of citizenship to the Indian did not destroy the right of the federal government to regulate and restrict his use of these lands. Though a citizen of the United States, he did not cease to be an Indian, and both he and his property remained subject to the national government. Congress has from time to time asserted this authority, and to hold that its enactments in that regard are unconstitutional, would be disastrous to the Indian, and would probably still further confuse the already complicated title to lands in Oklahoma. The extension of the period of restriction under the general allotment act is referred to with approval in *U. S. v. Celestine*, 215 U. S., 291. It is, of course, true that conveyances of allotments to third parties in accordance with the law in force at the time the conveyances were made, could not be impaired by subsequent legislation on the part of Congress enlarging the period of restriction against alienation. The whole scheme of allotment of lands in severalty to the Indians is an experiment. Congress, in the case of the Five Nations, has attempted to reserve to itself power to deal with the subject in the light of experience. If the plan proves a failure, after a fair trial, it would be disastrous, indeed, if the mere grant of citizenship to the Indian had placed him beyond the power of the federal government to adopt such measures for his welfare as experience should show to be necessary.

The decrees are reversed, and the trial court is directed to proceed with the suits in accordance with the views here expressed.

Filed June 8, 1910.

DAMS, *Circuit Judge*, dissenting:

I am unable to agree with my associates that the United States, of its own motion without the request or consent of the Indians whose rights are involved maintain these suits to remove a cloud from their title. When the suits were instituted the individual Indians held title in fee simple absolute to their several allotments. The undivided interests which they originally owned in tribal property had been effectually partitioned in the process of allotment provided by the act of March, 1893, and subsequent acts supplemental thereto. Any reversionary interest of the United States dependent upon possible abandonment of the land or extinction of the tribe had been relinquished.

The United States, therefore, had no proprietary right legal or equitable to protect or safeguard by suit or otherwise. Moreover, the Indians had become citizens of the United States and of the State

231p of Oklahoma and had become entitled to all the rights, privileges and immunities of such citizens. As a result of all these things guardianship of the Government over them had ceased and the Indians had become completely emancipated from federal control. Laws restricting alienation, hereafter referred to, had been passed for their protection, but this fact does not militate against the completeness of their emancipation. *Matter of Heff*, 197 U. S., 488.

With no title legal or equitable to protect, and no duty of a trust character to perform, a new head of equity jurisdiction had to be discovered to justify the maintenance of these suits by the Government; and this, it is claimed, is found in the obligation of the government to enforce a great National policy. The *Debs* case, 158 U. S. 564, and others of that character are cited in support of this discovery; but they do not as I understand them justify Governmental intervention, in behalf of private citizens except in the discharge of duties entrusted to the care of the Nation by the Constitution. The intervention of the Government in the *Debs* case appears to be justified on the ground that power over interstate commerce and the transportation of the mails was vested in the National Government by the Constitution. Conceding, however, without admitting, that the Government may intervene as complainant to redress the wrongs of a limited number of citizens arising out of matters not committed to its control by the Constitution, I think the National policy with respect to the Five Civilized Tribes is entirely inconsistent with the right or duty of the United States to institute suit in its own name for their benefit. The majority opinion dwells largely upon that part of the Indian policy which prevailed before the cessation of the National guardianship, that part of it which concerned the treatment of the Indians before emancipation when a duty rested upon the Government to protect them and prepare them for citizenship; but that time and that duty have passed away. Congress in its wisdom has determined that the Indians of the Five Civilized Tribes are now fit for citizenship and qualified to perform its duties and carry its responsibilities. It has accordingly modified its former policy to meet the new conditions. It has endowed the Indians with rights and responsibilities intended and calculated to develop self-reliance, independence and thrift. Citizenship has been conferred upon them and title to lands in fee simple has been vested in them with the expectation that the responsibilities incident thereto: the defense of their rights, the redress of their wrongs, the establishment of homes, the support of themselves and their families and generally speaking, the practice of the arts of civilized life may aid them in their social and economic development. In view doubtless of the cupidity of men and of their own natural improvidence Congress with a view of encouraging and aiding them in their upward progress enacted (35 Stat. 312) that "All allotted lands of enrolled fullbloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell,

231q power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one" except by permission of the Secretary of the Interior.

The foregoing considerations, in my opinion, indicate that Congress has adopted a new policy concerning these Indians, namely: the promotion of self-reliance, self-respect, economy and thrift, and to this end after making the special provision above indicated and perhaps others of like character, has left them otherwise subject to general laws governing all citizens. Equality of opportunity is all an American citizen ought to demand; and this and more in the respects just indicated Congress has given the members of the Five Civilized Tribes. With these special provisions made in their behalf the legislative intent and purpose seems to have been to leave them to justify their right to citizenship by coping with other citizens in the affairs of life on an equal footing without the expectation or hope of other special Governmental intervention. Such intervention in the way of institution of suits at wholesale as done in these cases without the request or consent of the Indians is not only humiliating in itself but tends to defeat the true National policy by discouraging self-reliance and independence of action.

The policy of encouraging and aiding the Indians to act for themselves independently, rather than of aggressively interfering without their consent, to assert their statutory rights is distinctly recognized if not commanded in Sec. 6 of the act of May 27, 1908, above cited. Sec. 1 of that act as already pointed out imposes certain restrictions upon the alienation of lands by the Indians. Sec. 6 after authorizing the Secretary of the Interior or his representatives to take special interest in behalf of minors under guardianship enacts that: "said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and *at the request of any allottee* having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, *in the name of the allottee*, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands."

231r Notwithstanding other provisions of the act, referred to in the opinion of the majority, I think the part just quoted manifests a clear legislative intent and purpose that the United States by and through the Secretary of the Interior should act with respect to the violation of restrictions primarily in an advisory way and instead of ever bringing suits in its own name at pleasure, should bring them only when requested by allottees and then only in their names.

If these suits can be maintained it is not apparent where the Government can stop in its litigation in behalf of private persons in the enforcement of National policies. There are certainly many recognized policies besides the Indian policy which might be materially subserved by the practice of Governmental intervention as in this case. Where would it end?

In my opinion the judgment below should be affirmed.

Filed June 8, 1910.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains a full, true and complete copy of the opinion in the case of United States, Appellant, v. James P. Allen, et al., No. 3150, and cases Nos. 3151 to 3163 inclusive, and Nos. 3265, 3276 and 3279, as full, true and complete as the original of the same remains on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-fourth day of February, A. D. 1911.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

232

(Decree of U. S. Circuit Court of Appeals.)

And on the seventeenth day of October, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1910.

MONDAY, *October 17, 1910.*

No. 3172.

THE UNITED STATES OF AMERICA, Appellant,

vs.

ROBERT L. OWEN et al.

* * * * *

No. 3277.

THE UNITED STATES OF AMERICA, Appellant,

vs.

G. L. MERRIMAN et al.

* * * * *

Appeals from the Circuit Court of the United States for the Eastern District of Oklahoma.

The above entitled causes came on to be heard upon the motion of the Appellant for an order vacating the general order of continuance and for a reversal of the decree of the Circuit Court of the United States for the Eastern District of Oklahoma, of which motion due notice appears to have been given.

On Consideration Whereof, and in pursuance of said motion, there being no appearance or objection thereto by counsel for Appellees, it is now here ordered, adjudged and decreed by this Court, that the decrees of the said Circuit Court, in each of the above causes, be, and the same are hereby reversed without costs to either party in this Court.

It is further ordered that each of these causes be, and the same are hereby remanded to the said Circuit Court with directions for further proceedings therein in conformity with the views expressed in the opinion of this Court in the case of The United States, Appellant, v. James P. Allen, et al., No. 3150.

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OCTOBER 17, 1910.

(Petition for and Order Allowing Appeal to Supreme Court U. S.)

And on the seventeenth day of October, A. D. 1910, a petition for an order allowing an appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit,
Sitting at St. Paul.

No. 3277.

THE UNITED STATES OF AMERICA, Appellant,
v.
G. L. MERRIMAN et al., Appellees.

Appeal from the Circuit Court of the United States for the Eastern
District of Oklahoma.

Petition and Order Allowing Appeal.

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Sitting at St. Paul:

The Deming Investment Company, a corporation, one of the appellees of the above entitled cause, conceiving itself aggrieved by the order and decree made and entered in the above named court in the above entitled cause under date of October 17, 1910, does hereby appeal to the United States Supreme Court at Washington, D. C., for the reasons set forth in the assignment of errors, which is filed herewith under and by virtue of a special act of Congress on June 25, 1910, and it prays that this its petition for appeal may be allowed and that the transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Supreme Court at Washington, D. C.

It further prays the transcript of the record consist of the following described proceedings and papers, to-wit:

- 234 1. Transcript of the record as certified to this court by the Clerk of the United States Circuit Court for the Eastern District of Oklahoma;
2. The order and judgment of this court reversing the action of the trial court;
3. Petition for appeal and order allowing same;
4. Assignment of errors filed with the petition for appeal.
5. Appeal Bond.

DEMING INVESTMENT COMPANY,
By GEORGE C. BUTTE,
ROBT J. BOONE, *Its Attorneys.*

Filed Oct. 17, 1910.

JOHN D. JORDAN, *Clerk.*

Order Allowing Appeal.

The foregoing petition is hereby granted and the appeal therein prayed for allowed and the Clerk of this court is instructed to make and authenticate the record as above set forth.

It is further ordered that the bond on appeal be fixed at the sum

of \$500 Dollars, the same to act as a supersedeas and cost bond herein.

Dated at St. Paul, Minnesota, in open court this the 17th day of October, 1910.

WALTER H. SANBORN,
Presiding Judge.

Filed Oct. 17, 1910.

JOHN D. JORDAN, *Clerk.*

(Endorsed:) No. 3277. The United States of America, Appellant, vs. G. L. Merriman et al., Appellees. Petition and Order allowing Appeal. Filed Oct. 17, 1910, John D. Jordan, Clerk. Butte & Boone, Attorneys for appellee, Deming Inv. Co.

235 (*Assignment of Errors on Appeal to Supreme Court U. S.*)

And on the seventeenth day of October, A. D. 1910, an assignment of errors on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit,
Sitting at St. Paul.

No. 3277.

THE UNITED STATES OF AMERICA, Appellant,

v.

G. L. MERRIMAN et al., Appellees.

Assignments of Error.

Now comes the Deming Investment Company, a corporation, one of the appellees in the above entitled cause, by its solicitors and files the following assignments of error upon which it will rely for grounds of reversal in its appeal from the order and decree made by this Honorable Court on the 17th day of October, 1910, in the above entitled cause.

The Court erred:

1. In reversing and remanding this cause to the United States Circuit Court for the Eastern District of Oklahoma;

2. In holding that the trial court had jurisdiction of the parties and subject matter.

3. In ordering the trial court to enter a decree sustaining the demurrer to the bill of complaint.

Wherefore, for these and divers other errors appearing upon the face of the record, the appellee, Deming Investment Company prays that the decree and order herein be reversed and remanded

with direction to render such proper decree and order on
236-239 the record as justice and equity demand.

DEMING INVESTMENT COMPANY,

By GEORGE C. BUTTE,

ROBT J. BOONE, *Its Attorneys.*

(Endorsed:) No. 3277. The United States of America, Appellant, vs. G. L. Merriman et al., Appellees. Assignments of Error. Filed Oct. 17, 1910, John D. Jordan, Clerk. Butte & Boegne, Attorneys for appellees, Deming Inv. Co.

* * * * *

240 In the Supreme Court of the United States of America.

No. 781.

DEMING INVESTMENT COMPANY, a Corporation, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

Stipulation to Print Record.

It is hereby agreed by and between the solicitors for the respective parties to the above entitled cause that the clerk of this court do prepare and cause to be printed the papers and all endorsements thereon hereinafter stated, omitting all others in said transcript included, to wit:

1. The entire Bill in Equity, excepting therefrom all the following numbered pages of the original bill, to wit: 11 to 121, both inclusive, except those pages below stated; it being the intention of the parties to leave and be printed as a part of the bill the following pages of the original bill which touch different conveyances, to wit:

Page.	Principal Defendant.	Degree of blood.
11.	John C. Davis.....	¼ Seminole;
18.	T. H. Smith.....	Full-blood Seminole;
19.	A. G. Hirschi.....	½ blood Seminole;
23.	J. O. Davis et al.....	¾ blood Seminole;
42.	Deming Investment Co.....	Seminole Freedman;
43.	Deming Investment Co.....	Seminole Freedman;
44.	James Arrowsmith.....	Seminole Freedman;
44.	Deming Investment Co.....	Seminole Freedman;
45.	Deming Investment Co.....	Seminole Freedman;
46.	Deming Investment Co.....	Seminole Freedman;
46.	Deming Investment Co.....	Seminole Freedman;
48.	A. T. Biggers et al.....	Dec'd ½ blood;
56.	Deming Investment Co.....	Seminole Freedman;
56.	James Arrowsmith.....	Seminole Freedman;
60.	W. A. Mitchell.....	Seminole Freedman;
		“ “ homestead;
65.	L. E. Patterson.....	General.
66.		

241 NOTE.—Inasmuch as the probabilities are that the transcript of the record now on file in this court has not preserved the original paging of this bill in the court below, it is agreed that counsel for appellant may point out to the clerk these respective conveyances.

2. Demurrers of the Deming Investment Company and Ed Prather; (173) (183).

3. Order and Decision of Judge Ralph E. Campbell, sustaining demurrer and dismissing bill; (189) (224).

4. Petition and Order for Appeal by the United States of America; (225).

5. Assignments of Error filed by the United States of America; (227).

6. Motion of the United States of America in Circuit Court of Appeals to reverse and remand, in accordance with the opinion filed in the case of the United States of America v. J. P. Allen et al., and the Order of the Circuit Court of Appeals reversing and remanding; (231a &c.).

7. Copy of Opinion of Circuit Court of Appeals in the case of United States of America, appellant, v. J. P. Allen et al., appellees; (231p)

8. Petition of the Deming Investment Company for appeal to the Supreme Court and Order of Circuit Court of Appeals allowing same; (233)

9. Assignments of Error and Appeal Bond filed in the Circuit Court of Appeals by the Deming Investment Company; (235)

10. This Stipulation of Parties for the printing of record (240).

It is also agreed that the Clerk may insert in this record Certified Copies of the Opinion of Circuit Court of Appeals in case of J. P. Allen et al., and also of the Motion of Government to Vacate Continuance and enter Judgment in accordance with Allen case.

GEORGE C. BUTTE,

ROBT J. BOONE,

Solicitors for Appellant.

F. W. LEHMANN,

Solicitor General, for Appellee.

243 [Endorsed:] File No. 22,402. Supreme Court U. S. October Term. 1910. Term No. 781. The Deming Investment Company, Appellant, vs. The United States. Stipulation to omit parts of record in printing. Filed February 27, 1911.

Endorsed on cover: File No. 22,402. U. S. Circuit Court Appeals, 8th Circuit. Term No. 781. The Deming Investment Company, appellant, vs. The United States. Filed November 14th, 1910. File No. 22,402.

FILED
U.S. DEPT. OF JUSTICE
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U.S. DISTRICT COURT
SOUTHERD DISTRICT OF NEW YORK

Supreme Court of the United States

(October Term, 1911)

THE PRINCIPAL IN INTEREST OF

THE UNITED STATES

VS.

THE UNITED STATES

Appeals from the United States Circuit Court of Appeals for the Southern District of New York

FILED FOR APPEAL

Printed and Published by
THE NATIONAL BOOK CONCERN

In the
Supreme Court of the United States

October Term, 1911.

THE DEMING INVESTMENT COMPANY,
Appellant,

VS.

THE UNITED STATES,
Appellee.

No. 434.

*Appealed from the United States Circuit Court of Appeals for
the Eighth Circuit.*

STATEMENT OF THE CASE.

On the 22d day of July, 1908, the United States filed its bill in the Circuit Court of the United States for the Eastern District of Oklahoma, styled, *The United States, appellant, v. G. L. Merriman et al, appellees*, to have canceled, set aside and held for naught various conveyances, of parts of allotments executed, by Seminole allottees, upon the sole ground that such

conveyances were made in violation of the allotment agreements and the laws imposing restrictions upon alienation. The bill did not charge, nor was it contended, that there was any fraud, deception, duress, inadequacy of consideration or other actionable wrong. (Printed Record, p. 4.) Persons to the number of 154 were made parties defendant (Printed Record, pp. 2, 3, 4 and 5), but the grantors were not parties either plaintiff or defendant. No one of the defendants is in any manner interested in the conveyances to any of the other defendants. To this bill various demurrers were interposed. The cases were submitted to the trial court upon the bill and demurrers, which were properly set down for argument (Printed Record, p. 25), and on the 6th of August, 1909, the Honorable Ralph E. Campbell, District Judge, filed an opinion sustaining the demurrers to the bill. (Printed Record, pp. 25 to 48, both inclusive.) Pursuant thereto on the 13th day of September, 1909, a decree was entered, dismissing the bill. (Printed Record, p. 49.) From the decree of dismissal, the United States prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit. This cause was submitted to the United States Circuit Court of Appeals for the Eighth Circuit on the 17th day of October, 1910 (Printed Record, p. 69), and the court, on the same day, made an order reversing the judgment of the Circuit Court for the Eastern District of Oklahoma and remanded the cause to the trial court for further proceedings (Printed Record, p. 69), the same being remanded in accordance with the decision of that court in the case of the *United States, appellant, v. James P. Allen et al, appellees*, No. 3150, and the opinion in the Allen case was made the opinion in this case. Prior to the time of the reversal of this cause, Congress, apparently realizing the importance of the question involved, enacted a law which authorized an appeal from the judgment of the Circuit Court of Appeals direct to this Court from such

judgment of reversal. The provision allowing such an appeal is found in Section 3 of the Act entitled "An Act to Authorize the Secretary of the Interior to Issue a Patent to the City of Anadarko, State of Oklahoma, for a Tract of Land, and for Other Purposes" (Stat. 61st Congress, second session, part 1, pages 836, 837, ch. 408). The said section is as follows:

"That an appeal to the Supreme Court of the United States in all suits affecting the allotted lands within the Eastern District of Oklahoma or on demurrers in such suits appealed to the United States Circuit Court of Appeals, Eighth Circuit, is hereby authorized to be made by any of the parties thereto, including the appeals from orders reversing judgments of the trial court."

Pursuant to the Act of Congress aforesaid, allowing an appeal to this Court, the appellant, The Deming Investment Company, a corporation, on the 17th day of October, 1910, presented to the Circuit Court of Appeals of the Eighth Circuit, in open court, and at the same term at which the judgment was rendered, its petition praying an appeal to this Court, together with their assignments of error. (Printed Record, pp. 70 and 71.) The appeal was duly allowed by the court. (Printed Record, pp. 70-71.) Supersedeas bond was presented and approved and the transcript duly lodged in this Court on the 14th day of November, 1910. This case, therefore, is before this Court upon its merits, upon all of the issues made by the bill and the demurrers.

ASSIGNMENTS OF ERROR.

1. The court erred in reversing and remanding this cause to the United States Circuit Court for the Eastern District of Oklahoma.

2. The court erred in holding that the trial court had jurisdiction of the parties and subject-matter.

3. The court erred in ordering the trial court to enter a decree overruling the demurrers to the bill of complaint.

The questions involved can be more intelligently presented by grouping them under the following heads than by following the assignments of error in detail, and, for that reason, the argument will be presented touching these questions:

1. The rights of the United States to maintain the action in any event, and without regard to whether the conveyances assailed are void.

2. The validity of the conveyances assailed.

ARGUMENT.

We will consider, first, the rights of the United States to maintain this suit, together with the incidental and subsidiary questions arising upon the sufficiency of the bill in its present form, and, second, the question of whether the lands conveyed by the deeds sought to be canceled were alienable at the time the conveyances were made.

The right of the United States to maintain the bill in the lower court and in the Circuit Court of Appeals was rested on the following propositions:

1. The supposed property interest of the United States in the lands involved arising from restrictions imposed upon alienation by the allotment agreements and laws enacted subsequent thereto;

2. Upon the supposed guardianship of the United States over the persons of the various members of the Five Civilized Tribes;

3. Upon a supposed public policy;

4. Upon the provisions of the Act of May 27, 1908 (35 Stat. 312).

The trial court denied the contentions of the government based upon each and every of these claims. As we interpret the decision of the Circuit Court of Appeals, it denied the contentions as based upon the first and second grounds above set out; sustained the same upon the third and concluded that the fourth lent some support to the conclusions arrived at with reference to the third.

We shall insist in this brief, first, that the United States had no property interest whatever in the lands in-

volved; second, that the members of the Five Civilized Tribes are citizens of the United States and of the State of Oklahoma; are not wards of the Government of the United States or any other government; that only the allottees, themselves, may maintain suits to cancel conveyances covering their individual allotments; that there is a defect of parties; third, that there existed no such public policy as declared by the Circuit Court of Appeals, and if such policy did exist, it could not operate to confer jurisdiction to entertain a suit at the instance of the United States to cancel the conveyances complained of; fourth, that the Act of May 27, 1908, did not authorize the bringing or maintenance of this suit; fifth, that under the provisions of the Seminole Agreement of December 16, 1897, approved July 1, 1898 (30 Stat. 567):

"All contracts for sale, disposition or encumbrance of any part of any allotment made prior to date of patent shall be void."

The said agreement further provided:

"When the tribal government shall cease to exist, the Principal Chief last elected by said tribe shall execute under his hand and the seal of the nation, and deliver to each allottee, a deed conveying to him all the right, title and interest of the said nation and the members thereof, in and to the lands so allotted to him. * * * Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and non-taxable as a homestead in perpetuity."

Section 8 of the Indian Appropriation Act of March 3, 1903 (32 Stat. 982-1008), provides as follows:

"That the tribal government of the Seminole Nation shall not continue longer than March 4, 1906, provided that the Secretary of the Interior shall, at the proper time, fur-

nish the Principal Chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation, contained in the Act of July 1, 1898 (30 Stat. 567), and the said Principal Chief shall execute and deliver said deeds to Indian allottees as required under said Act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee, until further legislation by Congress, and such records shall have like effect as other public records; provided, further, that the homestead referred to in said Act shall be inalienable during the lifetime of said allottee, not exceeding twenty-one years from the date of the deed for the allotment."

On March 2, 1906, Congress passed the following joint resolution, which was duly approved by the President (34 Stat. 882) :

"That the tribal existence and present tribal government of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes or Nations in the Indian Territory are hereby continued in full force and effect for all purposes under the existing laws, until all property of such tribes or the proceeds thereof shall be distributed among the individual members of such tribes, unless hereafter otherwise provided by law."

And on April 26, 1906, Congress passed another Act (34 Stat. 137-148), which provided as follows:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes or Nations are hereby continued in full force and effect for all purposes authorized by law until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year, provided that no act, ordinance or resolution (except resolution of adjournment) of the Tribal Council or Legislature of any of said tribes or nations shall be of any

validity until approved by the President of the United States; Provided further, that no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof shall be of any validity until approved by the President of the United States."

There was also a proviso to Section 6 of said Act, which reads as follows:

"Provided that the Principal Chief of the Seminole Nation is hereby authorized to execute deeds to the allottees in the Seminole Nation prior to the time when the Seminole Government shall cease to exist."

The Act of April 21, 1904 (33 Stat. 189) provided:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who were not of Indian blood, except minors, are, except as to homesteads, hereby removed and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads may be removed, with the approval of the Secretary of the Interior under such rules and regulations as the Secretary may prescribe."

We, therefore, contend that under these treaties and the Acts of Congress, that the restrictions were removed from adult Seminole Freedmen's surplus lands.

TREATIES AND STATUTORY PROVISIONS AFFECT- ING THE LANDS OF ALLOTTEES IN THE FIVE CIVILIZED TRIBES.

It is necessary to consider the nature and character of the title of the allottees whose lands are involved. To do this we must consider the Laws and Treaties by which each of the Five Civilized Tribes acquired title to the tribal domain, and also the various allotment agreements and statutory provisions under which the tribal lands were allotted in severalty to the individual members of the Tribes whereby the fee simple title was vested in such members.

1. Tribal Titles.

a. Choctaws and Chickasaws.

On the 8th day of October, 1820 (7 Stat. 210), the United States ceded to the Choctaw Nation the tract of country which subsequently constituted the Choctaw and Chickasaw Nations. The cession is in the following language:

"For and in consideration of the foregoing cession, on the part of the Choctaw Nation, and in part satisfaction for the same, the Commissioners of the United States, in behalf of said States, do hereby cede to said Nation, a tract of country west of the Mississippi River, and bounded as follows:" etc.

On the 27th day of September, 1830, the United States entered into another treaty with the Choctaw Tribe or Nation, by the terms of which they ratified the previous cession. (7 Stat. 333.)

In 1837 the Choctaws and Chickasaws, with the approval of the United States, entered into an agreement, by the terms of which the Chickasaws were to have a district in the Choctaw country and the members of each tribe were to have the same interest in the lands of the other tribe as in that of their own. (11 U. S. Stat. 57.) There is, therefore, no distinction, either as to tribal title or the title of the individual allottee, as between the Choctaws and Chickasaws.

By the treaty of 1855 the United States declared that "And pursuant to an Act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw Tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole; provided, however, no part therein shall ever be sold without the consent of both tribes; and the said lands shall revert to the United States if said Indians and their heirs become extinct, or abandon the same." (11 U. S. Stat. 611.)

In 1866 the United States entered into a new treaty with the Choctaws and Chickasaws confirming the grants made in the treaties of 1830 and 1855. (14 Stat. 769.)

The result of these agreements and the grants therein contained was to pass to the Choctaw and Chickasaw Tribes a fee simple title to the lands described, defeasible only on the happening of the contingency mentioned in the proviso, to-wit: "If the said Indians and their heirs become extinct or abandon the lands so granted." At no time since 1830 have the United States had a greater interest in the lands of the Choctaws and Chickasaws than the mere possibility of a reversion. Such was the nature of the title of these two tribes when the negotiations for the allotment of the lands among the members thereof were begun; and it was in recognition of this title that the United States deemed it necessary to secure the consent of the tribes to a division of the tribal lands.

b. Creeks.

On the 14th day of February, 1833, the United States entered into a treaty with the Creeks (7 Stat. 417), which was proclaimed the 12th day of April, 1834. Article 3 of this treaty is as follows:

"The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the lands assigned said Nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

Pursuant to this treaty, on the 11th day of August, 1852, the President of the United States executed a patent to the Creek Nation for the lands therein described. The granting clause of which is as follows:

"Now know ye that the United States of America, in consideration of the premises and in conformity with the above recited provisions of the treaty aforesaid, have given and granted and by these presents do give and grant unto the said Muskogee or Creek Tribe of Indians the tract of country above described. To have and to hold the same unto the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them."

It will be observed that the treaty and grant are substantially identical with the treaty with and grant to the Choctaws and Chickasaws.

On August 7, 1856, another treaty was entered into with the Creeks ratifying and confirming the title conveyed by the patent above referred to.

c. Seminoles.

By Article 1 of the Treaty of 1856, between the United States and Creek and Seminole Tribes of Indians (11 Stat., 699), the Creek Nation by and with the consent of the United States granted, ceded and conveyed to the Seminole Indians a tract of country included within certain described boundaries. The Third Article of the Treaty of 1866, entered into by and between the United States and Seminoles (14 Stat. 755) contained the following grant:

"In consideration of said grant and cession of their lands, estimated at two million, one hundred and sixty-nine thousand and eighty (2,169,080) acres, the United States agree to pay said Seminole Nation the sum of three hundred and twenty-five thousand, three hundred and sixty-two (\$325,362) dollars, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby GRANT to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so GRANTED by the United States to the Seminole Nation are bounded and described as follows, to-wit: Beginning on the Canadian river, where the line dividing the Creek land according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north, to where said line crosses the North Fork of the Canadian river; thence up said North Fork of the Canadian river; thence up said North Fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written." * * * * *

(Kappler, Vol. 2, p. 911).

It will be observed, therefore, that there is no limitation of any character upon the grant made to the Seminoles, nor is there any reversionary interest reserved to the United States. It is simply a clear and distinct grant passing an untrammelled fee simple title.

d. Cherokees.

On the 6th day of May, 1828, the United States entered into an agreement with the Cherokee Nation, Article 2 of which contained the following stipulation:

"The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows:" etc.

Subsequently on the 31st day of December, 1838, a patent was issued to the Cherokee Nation conveying said lands and having the following granting clause: "To have and to hold the same, together with all the rights, privileges and appurtenances thereto belonging to the said Cherokee Nation forever. * * * The lands hereby granted shall revert to the United States if the Cherokee Nation becomes extinct or abandons the same."

Dissensions having arisen among the different bands of the Cherokees, a new treaty was made with the United States on August 6, 1846, by Article 1 of which previous grants were ratified and confirmed in the following language:

"That the United States will forever secure and guarantee to them and their heirs or successors, the country so exchanged to them, and if they prefer the United States will cause a patent or grant to be made to them and executed for same; provided, always, that such land shall revert to the United States if the Indians become extinct or abandon the same." (9 Stat. 871.)

The interest of the United States in the Cherokee domain was, therefore, the possibility of a reversion in the event the Cherokee Nation should become extinct or abandon the lands granted. In each case the possibility of the reversion existing in favor of the United States has been not only rendered impossible, but waived by the United States in the clearest and most forcible language. This waiver is in the form of a consent to the allotment of the lands to the members of the tribe and in the vesting in such members an absolute and unqualified fee simple title to the lands selected and received in allotment.

2. Title of Allottees to Individual Allotments.

a. Choctaws and Chickasaws.

The original allotment agreement entered into between the United States and the Choctaws and Chickasaws, known as the Atoka Agreement, became a law as Section 29 of the Act of June 28, 1898 (30 Stat. 495). Before any of the lands of the Choctaws and Chickasaws had been allotted, a Supplemental Agreement was entered into (32 Stat., 641), which dealt with practically the entire subject of the allotment of lands to the members of the Choctaw and Chickasaw Tribes and freedmen. Under Section 11 of this Supplemental Agreement "There shall be allotted to each member of the Choctaw and Chickasaw Tribes, as soon as practicable after the approval by the Secretary of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval of the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable lands of the Choctaw and Chickasaw Nations." * * *

Sections 66 and 68 of this Agreement are as follows:

(66) "All patents to allotments of land, when executed, shall be recorded in the office of the Commission to the Five Civilized Tribes within said nations in books appropriate for the purpose, until such time as Congress shall make other suitable provision for record of land title as provided in the Atoka Agreement, without expense to the grantee; and such records shall have like effect as other public records.

(68) No Act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations."

b. Creeks.

Section 3 of the original Creek Agreement (31 Stat. 861), provided that "All lands of said Tribe, except as herein provided, shall be allotted among the citizens of the Tribe by said commission, so as to give each an equal share of the whole in value as near as may be." * * *

Section 8 of this Agreement is as follows:

"The Secretary of the Interior shall, through the United States Indian Agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided, and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land."

Section 23 of the same Agreement reads in part as follows:

"Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due

form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed.

Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment."

c. Seminoles.

The lands of the Seminoles were allotted under the provisions of the Seminole Agreement (30 Stat. 567), December 16, 1897, providing for a division of the lands of the Seminoles among the members of that tribe. The principal chief last elected by the tribe was required to execute a patent under his hand and the seal of the Nation, conveying to the allottee all the right, title and interest of the said Nation and the members thereof in the lands so allotted; the secretary is directed to approve such deed, and such approval to operate as a relinquishment of the right, title and interest of the United States to the lands conveyed; and the acceptance by the allottee is to operate as a relinquishment of his interest in the lands of the Tribe other than those selected by him in allotment.

d. Cherokees.

Under the provisions of Section 11 of the Cherokee Agreement (32 Stat., 716) :

"There shall be allotted by the commission to the Five Civilized Tribes and to each citizen of the Cherokee Tribe, as soon as practicable after the approval by the

Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements."

Sections 58, 59 and 60, relating to the passing of title to Cherokee allottees, are as follows:

(58) "The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate.

(59) All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent.

(60) Any allottee accepting such patent shall be deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in this act, and to relinquish all his right, title, and interest to the same, except in the proceeds of lands reserved from allotment."

All of the above provisions with reference to the allotment of lands of the various tribes should be considered and construed in the light of the previous legislation looking to allotment.

3. Legislation Affecting All Five of the Tribes.

On the 3d day of March, 1893, the President approved an Act of Congress (27 Stat. 645) authorizing the appointment of commissioners

"to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation, and the Seminole Nation for the purpose of extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same, or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other methods as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within the said Indian Territory."

Section 15 of the same Act is as follows (27 Stat. 645) :

(15) "The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotment the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

Pursuant to the authority conferred upon this commission to enter into agreements with the Five Civilized Tribes for the allotment in severalty of the lands of such tribes, and that "upon the allotment of the lands held by the said tribes,

respectively, the reversionary interest of the United States therein shall be relinquished and shall cease," negotiations were entered into, resulting in the agreements above quoted from.

It took the commission practically five years to secure the first agreement with one of the Civilized Tribes, and nearly ten years to perfect the agreements with all of the tribes. During all of the time, however, it was the same commission acting under the same authority and pursuant to the legislation by which it was originally created and empowered to act.

It will be observed in each instance that the deed or patent is to be executed by the Governor or Principal Chief, and not by the United States. The deed so executed is executed for and on behalf of the nation in its corporate or public capacity. This is a direct recognition of the fact that the title is in the nation, and not in the United States. If the title were in the United States the grant would be by the United States with the assent of the nation. This distinction is clearly sustained by the fact that wherever the Indians occupy a tribal reservation and the same is allotted to members of such tribes, the patent is executed by the United States, and not by the principal chief of the tribe. There is also a further provision that an acceptance by the allottee of the deed shall operate in effect as a consent upon his part to a division of the tribal lands and the relinquishment of any claim to the lands allotted to other members of the tribe.

In the same connection, in the Seminole, Creek and Cherokee Agreements, the approval of the Secretary is to operate as a relinquishment of the interest of the United States in and to the lands so patented to the allottee. The word "relinquishment" in this connection is clearly used in recognition of an existing right and not as a grant of a new and independent interest in the lands patented. The title to the tribal lands being in the nation, in its corporate capacity, there was nothing for the individual, accepting the allotment and patent from the nation, to grant or convey, by the accept-

ance of the patent on his part, nor did the approval of the patent by the Secretary amount to a grant on the part of the United States.

The term in which the word "relinquishment" is used in this connection is correctly interpreted in the case of *United States v. Joseph*, 94 U. S. 614. In that case this Court had under consideration a provision of the Act of Congress of December 27, 1858 (11 Stat. 374), relating to the Pueblo of Taos in the county of Taos, in which the Commissioner of the Land Office was ordered to "issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said surveyor-general, and cause a patent to issue therefor, as in ordinary cases to private individuals, provided, that this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist."

Discussing this provision and the meaning of the word "relinquishment" contained therein, this Court uses the following language:

"It is unnecessary to waste words to prove that this was a recognition of the title previously held by these people, and a disclaimer by the government of any right of present or future interference, except such as would be exercised in the case of a person holding a competent and perfect title in his individual right."

When the members of each of the Five Civilized Tribes select, as required by the provisions referred to, the lands they desire to take in allotment, and that selection is approved, nothing further remains to be done by such members in order to perfect their title to the lands so selected. The issuance of the allotment certificate and patent which follows are mere ministerial acts. It requires neither allotment certificate nor patent to pass title to the allottee. The provision that "there shall be allotted, etc.," contained in the various agreements

is sufficient when the land is selected and designated to pass title to the allottee without the necessity of certificate or patent.

- Wallace v. Adams*, 143 Fed. 716.
Jones v. Meehan, 175 U. S. 1, 16.
Doe v. Wilson, 23 How. 457.
Quinney v. Denney, 18 Wis. 485.
Crews v. Burcham, 1st Black. 352.
French v. Spencer, 21 How. 228.
Stark v. Starrs, 6 Wal. 402.
Lamb v. Davenport, 18 Wal. 307.
Ryan v. Carter, 93 U. S. 78.
Best v. Polk, 18 Wal. 112.
Oliver v. Forbes, 17 Kan. 113.
Clark v. Lord, 20 Kan. 390.
Francis v. Francis, 99 N. W. 14, 203 U. S. 233.
United States v. Torrey, 154 Fed. 263.
United States v. Moore, 154 Fed. 712.
New York Indians v. United States, 170 U. S. 1.

Restrictions upon alienation do not vest an interest in the United States or limit a fee simple title.

The mere existence of restriction upon alienation imposed for the protection of the allottee vests no interest whatever in the United States in reversion or otherwise. A violation of the statute imposing restrictions upon alienation does not in any event redound to the interest of the United States or impair the title of the allottee.

In *Libby v. Clark*, 118 U. S. 250, 255, the Court said:

"The title conveyed to Hurr by the patent was a *fee simple*; this is, it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. The restriction on his right to convey did not deprive the title of the character of a *fee simple estate*. 'An estate in the fee simple is where a man has an estate in lands or tenements to him and his heirs forever.' (4 Com. Dig.,

Estates 1.) The limitation on the power of the sale for five years is not inconsistent with the fee simple estate. Such, also, seems to have been the practice of the government in other treaties referred to by counsel in their brief."

In *Schrumpscher v. Stockton*, 183 U. S. 290, 299, the Court said:

"Here the United States had issued a patent to Rodgers 'and to his heirs and assigns forever,' subject to a condition, not that the title should revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not redound to the benefit of the United States or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the *title should remain in him*, notwithstanding any alienation that he might make."

The whole estate having vested in the allottee, there could be no possible interest remaining in the United States. Not even a possibility of forfeiture or reversion.

The United States own no property interest upon which to maintain this action, nor may the same be maintained for the protection of citizens, generally, against violations of law.

The sole authority of the Circuit Courts of the United States to exercise jurisdiction over causes where the United States are plaintiffs or petitioners, is given by the Act of August 13th, 1888 (25 Stat. 434). This statute was considered and construed by this Court in the cases of

United States v. Sayward, 160 U. S. 493.

United States v. Payne Lumber Company, 206 U. S. 467,

and by the Circuit Court of the United States in *United States v. Auger et al*, 153 Fed. 671, and *United States v. Paine Lumber Company*, 154 Fed. 263.

This Court has also had occasion to construe the provisions of Section 2, Art. III of the Constitution, conferring original jurisdiction upon *this* Court over "all controversies to which the United States may be a party, and to controversies between two or more states," in the cases of:

Louisiana v. Texas, 176 U. S. 1.

New Hampshire v. Louisiana, 108 U. S. 76.

Kansas v. U. S., 204 U. S. 331.

Minnesota v. Hitchcock, 185 U. S. 373.

Oregon v. Hitchcock, 202 U. S. 60.

U. S. v. Texas, 143 U. S. 621.

Oklahoma v. A. T. & S. Fe Ry. Co., 31 Sup. Ct. Rep. 434 (Advance Sheets).

We do not consider it necessary to further pursue this phase of the controversy because both the Circuit Court and the Circuit Court of Appeals found that the United States had no such property interests in the subject matter in controversy as to authorize the invoking of the jurisdiction of the Circuit Court of the United States.

We, however, desire to call the Court's attention to a terse, concise and carefully worded statement as to what interest is necessary in order to permit a sovereignty to maintain a suit, the same being a quotation from the opinion delivered by Justice Harlan for the Court in the case of *State of Oklahoma, complainant, v. The Atchison, Topeka & Santa Fe Railway Company, defendant*, decided the 3rd day of April, 1911, and reported in the 31st Supreme Court Reporter, pp. 434-437 (Advance Sheets). The language is as follows:

"We are of opinion that the words in the Constitution conferring original jurisdiction on this Court in a suit 'in which a state shall be a party' are not to be interpreted as conferring such jurisdiction in every cause

in which the state elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or public policy against wrongdoers generally."

And the following quotation from the opinion of this Court, speaking through Justice Harlan in the case of *State of Oklahoma v. Gulf, Colorado & Santa Fe Railway Company*, decided April 3d, 1911, 31 Supreme Court Reporter, pp. 437-441 (Advance Sheets):

"But there is another ground which is equally fatal to the claim that this Court may give the relief asked by an original suit brought by the State. In the provisions of the Constitution relating to the judicial power of the courts of the United States, it is provided, as we have seen, that 'in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction.' In *Oklahoma v. Atchison, T. & S. F. Ry. Co.*, No. 13, Original, just decided (220 U. S. —; *ante*, 434, 31 Sup. Ct. Rep. 434), it was held that a State could not invoke the original jurisdiction of the court, by suit on its behalf, where the primary purpose of the suit was to protect its citizens generally, against the violation of its laws by the corporations or persons sued; that the above words, 'those in which a state shall be a party,' were not to be so interpreted as to embrace suits of that kind."

Judge Amidon, speaking for the majority of the Circuit Court of Appeals in the case at bar (*United States v. Allen*, 179 Fed. 13), uses the following language:

"Turning now to the objections which were made and sustained by the trial court, has the Federal Government such an interest as entitles it to maintain these suits? It will be considered at the outset that it has no legal or equitable estate in the allotments and if such an estate is necessary, it has no standing in court."

We respectfully submit that in this declaration Judge Amidon was correct. That he is supported in his conclusion that the United States have no property interest by reason of the restrictions upon alienation, see the following decisions of this Court:

Libby v. Clarke, 118 U. S. 250-255.

Schrimscher v. Stockton, 183 U. S. 290-299.

U. S. v. Paine Lumber Company, 206 U. S. 467.

The former members of the Five Civilized Tribes are citizens of the United States and the State of Oklahoma, and not wards of either state or national governments.

The conclusions of the Circuit Court of Appeals, as expressed in the opinion of Judge Amidon, are erroneous largely because based upon a want of appreciation of the difference between the advance in civilization made by the members of the Five Civilized Tribes, as compared with blanket Indians, the nature of their tribal title and the character of the individual title acquired by the allottee.

A most careful examination of the opinion of Judge Amidon discloses that he was acting under the presumption that the members of the Five Civilized Tribes were nomadic blanket Indians, at least semi-barbarous, and more than a century of the public history of this tribe is entirely lost sight of.

As early as 1855, this Court in the case of *Mackey v. Cox*, (18 Howard 100, 102-3) said of the Cherokees:

"The Cherokees are governed by their own laws; as a people they are more advanced in civilization than any of the Indian Tribes, with the exception, perhaps, of the Choctaws. By the national council their laws are enacted, approved by their executive, and carried into effect through an organized judiciary. Under a law 'relative to estates

and administrators,' letters of administration were granted to the persons above named on the estate of Samuel Mackey, deceased, by the Probate Court, with as much regularity and responsibilities as letters of administration are granted by the state courts of the Union. * * * It is refreshing to see the surviving remnants of the races which once inhabited and roamed over this vast country as their hunting grounds, and as the undisputed proprietors of the soil, exchanging their erratic habits for the blessings of civilization."

That the Cherokees continued to progress is evidenced by the Treaty of 1866 (14 Stat. 799) the 13th Article of which declares:

"The judicial tribunals of the Nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country, in which members of the Nation by nativity or adoption shall be the only parties; or where the cause of action shall arise in the Cherokee Nation."

The Constitution of the Cherokees of 1827 is a model of simplicity and of the application of a written Constitution, republican in form, to tribal conditions.

Mehlin v. Ice, 56 Federal 12.

What is above stated with reference to the Cherokees applies with equal force to the Choctaws, Chickasaws and the Creeks, and in a somewhat more limited degree to the Seminoles.

In 1887, when the General Allotment Act became a law (24 Stat. 398-119), the advance made in civilization by the Five Civilized Tribes and the character of their tribal title caused their exemption therefrom.

On March 3, 1893, Congress created a Commission to negotiate with the Five Civilized Tribes for the allotment of their lands in severalty, for the purpose of the ultimate creation of a State or States of the Union, which shall "em-

brace the lands within the said Indian Territory." (27 Stat. 645.) Section 15 of this Act provided that

"Upon such allotment, the individual to whom the same may be allotted shall be deemed to be in all respects citizens of the United States, * * * and, upon the allotment of the lands held by the said Tribes respectively, the reversionary interest of the United States shall be relinquished and shall cease."

Allotment Agreements were made by the various Tribes and approval thereof given by Congress as follows:

Seminole Original Allotment Agreement (30 Stat. 567), Seminole Supplemental Allotment Agreement (31 Stat. 250); Choctaw and Chickasaw Allotment Agreement (30 Stat. 495-505); Supplemental Allotment Agreement (32 Stat. 641); Creek Allotment Agreement (31 Stat. 861); Creek Supplemental Agreement (32 Stat. 500), and Cherokee Allotment Agreement (32 Stat. 716).

The policy of isolation from surrounding country applied to Indians on Indian Reservations was never, in fact, applied to the territory of the Five Civilized Tribes. In 1890 there were 180,182 persons residing in Indian Territory, of whom 51,279 were Indians. In 1900, the population of Indian Territory had increased to 392,000, of which 52,500 were Indians. In 1890 the Indian population, which included a few more Indians than those of the Five Civilized Tribes, constituted 25.5 per cent of the total population and in 1900, 13.4 per cent.

These conditions, and the progress made in securing of Allotment Agreements with the various tribes, caused Congress in 1901 to deem it advisable to confer the full rights of citizenship upon every Indian in the Indian Territory. In 1900 a bill was introduced in the House of Representatives, being House Bill No. 10701, which is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That Section 6 of Chapter 119, U. S. Statutes at Large, page 390, is hereby amended as follows,

to-wit: After the words 'civilized life,' in line 13, in said Section 6, insert the words, 'and every Indian in the Indian Territory.'"

This Act duly passed both branches of Congress and was approved by the President and became a law on the 3d day of March, 1901. (31 Stat. 1447.)

That Congress understood that the purpose of this amendment was to confer full and complete citizenship upon every Indian in the Indian Territory, appears from the language of the Act, and from a debate thereon in the House of Representatives, June 5th, 1900, appearing in Volume 33, Congressional Record 8, page 6760, and from a debate in the House on March 9th, 1906, when the House had under consideration what finally became the Act of May 8th, 1906 (34 Stat. 182-3), and which appears in Congressional Record Vol. 40, No. 4, page 2598, and from a report of the Senate Committee, to whom said bill was referred when it was under consideration, that report being as follows:

"The Committee on Indian Affairs, to whom was referred the bill (H.R. 10701) to amend Section 6, Chapter 119, United States Statutes at Large, No. 24, beg leave to submit the following report and recommend that said bill do pass without amendment.

The statute proposed to be amended provided for granting citizenship to all Indians upon receipt by them of their allotments, but made an exception of the Five Civilized Tribes, who at the time protested, on the ground that they were conducting governments of their own, which would be weakened by such a step. These governments are now completely changed and this reason has disappeared.

Under the operation of the statute referred to the Indians in Oklahoma, such as the Pawnees, the Sac and Foxes, Pottawatomies, Kickapoos, the Cheyennes and Arapahoes, and in the Indian Territory the Quapaws, the Senecas, the Wyandottes, the Ottawas and the Shawnees, and even the Modocs, have all been granted the valuable right of United States citizenship. None of these

Indians are so highly advanced as the Five Civilized Tribes, and none so well prepared to enjoy United States citizenship.

The independent self-government of the Five Civilized Tribes has practically ceased. The policy of the Government to abolish classes in Indian Territory and make a homogeneous population is being rapidly carried out. To enable the Indians of Indian Territory to properly protect their rights they should be given the right of United States citizenship immediately. They should at once be put upon a level and equal footing with the great population with whom they are now intermingled.

There are about 70,000 Indians in Indian Territory, many of whom are already United States citizens. It is doubtful whether, under the statutes, these Indians can perform any of the usual personal business engagements which are taking place daily on a vast scale in Indian Territory without a technical violation of the laws requiring supervision of the Indian people. It is true that these laws are regarded by the people of Indian Territory as not applicable to them. But all questions with regard to this matter should be eliminated by giving to them legal rights equal with other men.

By the terms of the Act 'For the protection of the people of the Indian Territory, and for other purposes,' the members of the Five Civilized Tribes are authorized to bring suits in the United States courts to recover possession of property, they are permitted to vote, and under existing laws they act on juries.

This bill simply extends to the members of the Five Civilized Tribes the same privileges that are enjoyed by other Indians to whom allotments have been made."

This Court may, in arriving at the purpose of Congress in the enactments above referred to, interpret the same in the light of the history of such Acts and existing conditions, and may consider the report of the Senate committee.

Oceanic Navigation Co. v. Stranahan, 214 U. S. 320-333.

The Delaware, 161 U. S. 459.

Buttfield v. Stranahan, 192 U. S. 470.

Sutherland on Statutory Const., 2d Ed., Sec. 470.

In the case of the *Oceanic Navigation Company v. Stranahan*, this Court, speaking through Mr. Justice White, with reference to the consideration of the report of the Senate committee on immigration, uses the following language:

"While we have said that the conclusions just stated are clearly sustained by the text, yet, if ambiguity be conceded, it is dispelled, and the same result is reached, by a consideration of the report of the Senate committee on immigration, where the provisions originated and which we have a right to consider as a guide to its true interpretation."

The purpose of the Act as stated by the Senate committee was to place the Indians of Indian Territory "upon a level and equal footing with the great population with whom they are now intermingling."

Section 6 of the General Allotment Act as amended, the amendment being in italics, is as follows:

"That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, *and every Indian in Indian Territory* is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians

within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

It will be observed that Section 6, as amended, makes every Indian in the Indian Territory a citizen of the United States and confers upon him all the "*rights, privileges and immunities of such citizens.*" (Italics ours.)

The word "all" is used for some purpose. There is no broader term in the English language. The result of so conferring citizenship was declared in *In re Heff* (197 U. S. 488) to be to dissolve the relation of guardian and ward and to endow such Indians with the full rights of citizenship.

We quote from the opinion in that case, speaking with reference to the particular statute here under consideration, as follows:

"We make these references to recent treaties, not with a view of determining the rights created thereby, but simply as illustrative of the proposition that the policy of the Government has changed, and that an effort is being made to relieve some of the Indians from their tutelage and endow them with the full rights of citizenship, thus terminating between them and the United States the relation of guardian and ward. * * *

The Oklahoma Enabling Act (34 Statutes 267) provides that the

"*inhabitants* of all that part of the area of the United States now constituting the Territory of Oklahoma and of Indian Territory, as at present described, may adopt a Constitution and become the State of Oklahoma, as hereinafter provided. * * *" (Italics ours.)

Section 2 of the Enabling Act provides:

"That all male persons over the age of 21 years who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory or

Oklahoma, and who have resided within the limits of said proposed state for at least six months next preceding election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed state."

These sections made the inhabitants of Oklahoma and Indian Territory, including not only those persons who were then citizens of the United States, but also all members of any Indian tribe residing in either territory, members of the political community and citizens of the new state to be formed from the two territories.

In *Miner v. Happersett*, 21 Wallace 162-167, this Court, speaking with reference to citizenship in a state, uses the following language:

"Whoever then was one of the people of these states when the Constitution of the United States was adopted became *ipso facto* a citizen and a member of the state created by its adoption. He was one of the persons associated together to form the nation and was, consequently, one of its original citizens. As to this, there never has been a doubt. Disputes have arisen as to whether or not certain persons, or certain classes of persons, were a part of the people at the time, but never as to their citizenship, if they were."

The provisions of the Oklahoma Constitution made every Indian in the Indian Territory, regardless of his Federal citizenship, "one of the people of the State of Oklahoma," and therefore he "was adopted" and "became *ipso facto* a citizen and member of" the state created thereby. And such is the rule approved and declared by this Court in the case of *Boyd v. Thayer*, 143 U. S. 175, and in *Bolln v. Nebraska*, 176 U. S. 88. At the time of the institution of this suit, therefore, every Indian in the Indian Territory, including every member of the Five Civilized Tribes, was, by authority of the Act of March 3d, 1901, and by authority of the provisions of the Enabling

Act and the Constitution of the State of Oklahoma, a citizen of the United States and of said state, with all of the rights, privileges and immunities of such, and became subject to the laws of the State of Oklahoma. Congress, therefore, having conferred upon the members of the Five Civilized Tribes citizenship in the United States, with all of the rights, privileges and immunities thereof, and having constituted such members of said tribes (with the consent of the people of the state as conditioned in the Constitution thereof) citizens of the State of Oklahoma, and having subjected them to the laws of said state, civil and criminal, they were in the specific condition referred to by this Court in *In the Matter of Heff* (197 U. S. 499-508) and described in the following language:

"We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the state, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and incumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

And that such was the result of this legislation was adjudged by the trial court in this cause (*U. S. v. Allen*, 171 Federal 907-917), and was not denied by the Circuit Court of Appeals in reversing the judgment of the trial court (*United States v. Allen*, 171 Federal 913-919).

The effect of the General Allotment Act of 1887 as applied to conditions similar to those in Oklahoma with reference to citizenship was considered by Judge Hanford in the cases of *United States v. Saunders*, 96 Federal 268; *United States v.*

Kopp, 110 Federal 161, and *Ex parte Viles*, 139 Federal 68; by Judge Whitson, in the case of *United States v. Dooley*, 151 Federal 697; by Judge A. L. Sanborn, in the case of *United States v. Auger et al*, 153 Federal 671; by Judge Pollock, in case of *Ex parte Savage*, 158 Federal 205; by Judge Quarles, in the case of *United States v. Hall*, 171 Federal 214, and by Judge Marshall, in the case of *United States v. Boss*, 160 Federal 132, all of whom arrived at the same conclusion as that arrived at by Judge Campbell in his opinion sustaining the demurrers to the bill.

Judge Campbell's conclusion was that every Indian in the Indian Territory is a citizen of the United States and of the State of Oklahoma, with all of the rights, privileges and immunities of citizenship, state and national; that the conferring of citizenship destroyed the relation of guardian and ward and placed the former members of the Five Civilized Tribes upon an equal footing with the other citizens of the United States, with whom they daily intermingled and came in contact.

It seems to us that the logic of Judge Campbell's opinion is unanswerable, and that there is no reasonable escape from the conclusions arrived at by him. These conclusions have the direct and unqualified support of Judge Adams, in his dissenting opinion in this cause. This dissenting opinion is, we insist, much more logical and much more in keeping with the established standard of statutory construction than is the majority opinion.

No such public policy exists as that upon which the jurisdiction of the trial court was sustained by majority of the Circuit Court of Appeals.

Prior to 1893 the members of the Five Civilized Tribes in the Indian Territory were wards of the United States, and the title to the tribal lands was in the tribes, respectively. The United States, therefore, had control of the lands because of

the fact that they were tribal lands, and of the members of the tribes because they were wards of the National Government.

In 1893 a new policy in dealing with these tribes found its inception in the Act of March 3d, 1893 (27 Stat. 645), authorizing the allotment in severalty of the tribal lands and provided that upon such allotment in severalty of the tribal lands the members of the said tribes "be deemed to be in all respects citizens of the United States," and thereupon the "reversionary interest of the United States shall be relinquished and shall cease."

The declared purpose of this Act was to make an equitable distribution of the tribal property, confer citizenship upon the members thereof, relinquish the reversionary interest of the United States and prepare the territory for statehood. In other words, to individualize the tribal holdings, giving fee simple title to the allottees, endowing them with full citizenship and forever severing the relation of guardian and ward.

This policy was persistently carried out through all the years from March, 1893, to June 21st, 1906.

The United States originally had control of the individual Indian because of its guardianship. It had control of the lands, because they were tribal domain. It is incomprehensible that if it was the purpose of the Government to retain its control over either the *individual members* of the tribes or the allotted lands of such members that it should have, in 1901, deliberately severed the tie of personal control by making every Indian in the Indian Territory a citizen of the United States with all the rights, privileges and immunities of such. That if it was still the purpose to reserve the right to control the lands of the members of the Five Civilized Tribes, it was inexcusable on the part of the Government that it permitted the lands to be allotted in severalty to the individual members of the tribes, passing fee simple title to such members and relinquishing its reversionary interest, thereby severing its control over such property. If it had been the policy of the Government to exer-

cise the control that is now asserted, it certainly would not have severed personal control by the emancipation of its wards, and property control by the allotment in severalty of the reversionary interest of the United States.

The actions here referred to are absolutely inconsistent with the assertion of the policy contended for. The policy evidenced by this course of dealing was to emancipate the individual Indian from national guardianship and to convert the tribal domain, which might be managed or controlled by the National Government, into an individual fee simple holding which might not be controlled by the National Government.

We therefore respectfully submit that upon the question of whether or not such policy did, in fact, exist, the evidence is overwhelmingly against the Government's contention.

Public Policy as a Head of Federal Equity Jurisdiction.

Circuit Judge Adams, in his dissenting opinion in this case, makes the following statement:

"With no title, legal or equitable, to protect and no duty of a trust character to perform, a new head of equity jurisdiction had to be discovered to justify the maintenance of these suits by the Government; and this, it is claimed, is found in the obligations of the Government to enforce a great national policy."

Judge Amidon, speaking for the majority of the court, uses the following language:

"Turning now to the objections which were made and sustained by the trial court, has the Federal Government such an interest as entitles it to maintain these suits? It will be conceded at the outset that it has no legal or equitable estate in the allotments; and if such an estate is necessary it has no standing in court. It is, however, too plain for controversy that the Federal Government imposed restrictions upon alienation of these allotments. That restriction was its main reliance for

the social and industrial elevation of the Indians. Has it a standing in court for the enforcement of its policy? To say that it has not is to make the restraints upon alienation a mere *bruten fulmen*."

Circuit Judge Adams, sitting as a member of the Court of Appeals, and District Judge Campbell, sitting as a trial judge, were each of the opinion that no such public policy existed as that outlined in the majority opinion, and that if it did exist it could not be enforced at the suit of the United States.

District Judge Amidon, with whom Circuit Judge Hook at least concurred in the results, determined that such a policy existed and that it afforded authority for the institution and maintenance of this suit and operated to confer jurisdiction upon the Circuit Court to entertain the same.

No better illustration can be had of the uncertainties resulting from a departure from the usual and ordinary canons of statutory construction and the adjudging and determining of rights without regard thereto upon a supposed public policy. Two judges say such a policy exists. Two of equal rank say it does not exist. The two who say the policy does not exist undertake to solve the questions presented by the ordinary canons of statutory construction. The two who say such a policy does exist apparently appeal to the *unwritten law* as a higher authority than the positive enactment of a statute.

We respectfully insist that in declining to apply the terms of the statute and in determining the rights of the parties involved in this controversy upon the supposed public policy, the Circuit Court of Appeals committed serious error.

This Court, in the case of *Hadden v. Collector* (5 Wallace 107-111), uses the following language with reference to the suggestion that it should be controlled by the public policy of the Government in interpreting certain legislation, to-wit:

"What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing upon which all sorts of notions, each vari-

ant from the other, may be formed by different persons. It is a ground much too unstable on which to rest the judgment of the court in the interpretation of statutes." (Italics ours.)

In the case of *Bate Refrigerating Company v. Sulzberger* (157 U. S. 1-36), where this Court was again invited to depart from the ordinary canons of construction and follow a supposed public policy, the following language is used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden v. Collector* (5 Wallace 107-111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.'"

In the case of *Dewey v. United States* (178 U. S. 510-521), this Court, discussing the matter of determining the effect of a statute by supposed public policy, uses the following language:

"In our examination of this case we have not forgotten the skill and heroism displayed by the distinguished commander of our fleet in the battle of Manila, as well as by the officers and sailors acting under his orders. All genuine Americans recall with delight and pride the marvelous achievements of our navy in that memorable engagement. But this Court cannot permit considerations of that character to control its determination of a judicial question or induce it to depart from the established rules for the interpretation of the statutes. Nor can we allow our judgment to be influenced by the circumstances that Congress has recently repealed all statutes giving bounty to officers and soldiers of the navy for the sinking or destruction hereafter, in time of war, of an enemy's vessels, thereby, it may be assumed, indicating that in the judgment of

the legislative branch of the Government the policy of giving bounties to the navy *was not founded in wisdom and should be abandoned. This Court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress.* What is termed the policy of the Government in reference to any particular subject of legislation, this Court has said, 'is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' (*Hadden v. The Collector*, 5 Wall. 107, 111.) Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be the law which Congress has not enacted as such." (Italics ours.)

We desire to again call the Court's attention to a previous quotation from the opinion of this Court in the case of *State of Oklahoma v. Atchison, Topeka & Santa Fe Railway Company*, *supra*. It is as follows:

"We are of the opinion that the words in the Constitution conferring original jurisdiction on this Court in a suit 'in which a state shall be a party' are not to be interpreted as conferring such jurisdiction in every case in which the state elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or *public policy* against wrongdoers generally." (Italics ours.)

If the enforcement of a public policy or of a law of a state is not sufficient to justify a state to maintain an original proceeding in this Court, how can it be said that the enforcement of a public policy is sufficient to confer jurisdiction upon the Circuit Court of the United States?

The attention of the Court is also invited to the following cases:

In re Wolfe & Levy, 122 Federal 127-133.

Southern Ry. Co. v. Machinists' Local Union, 111 Federal 49-57.

Shellenberger v. Ransom, (Neb.) 59 N. W. 935.

United States v. Chongsam, 47 Federal 884.

Opinion of the Justices, 66 N. H. 665, 33 Atlantic 1095.

The Circuit Court of Appeals apparently held that the interest of the United States in seeing its laws enforced was sufficient to justify the initiation of a proceeding upon its behalf purporting to be in favor of one citizen in a state against another in the same state, to remedy the supposed infraction of such laws.

The authority for this proceeding, as determined by said court, is the public policy of the United States to see that its laws are enforced. It is undoubtedly the policy of every Government that the laws enacted by its legislative body should be observed and enforced. We are not aware of any case in which it has been held that the United States may intermeddle in controversies between citizens of a state or create controversies between citizens of a state over their objections, because, in the judgment of some administrative officer, the laws of the United States, which are neither criminal nor penal in their nature, have not been observed in the making of the transaction assailed.

Provision is made by the laws of the United States for the acquiring of homesteads by certain persons upon public lands of the United States and for the protection of such homesteaders against incompetency, bad judgment and misfortune. It is provided (Revised Statutes, Sec. 2296) that "no lands acquired under the provisions of the chapter shall, in any event, become liable for the satisfaction of any debt contracted prior to the issuing of the patent therefor." It is, therefore, undoubtedly the declared policy of the United States to protect the homesteader on the public lands against enforced alienation

of his homestead upon any debt contracted prior to the issuing of the patent.

Suppose such homestead be levied upon under an execution issued upon a judgment for a prior debt. Could the United States bring a suit to enjoin the sale of the property under execution or take any other proceeding to prevent such sale? If public policy is sufficient authority for the institution of a suit in the Circuit Court of the United States to cancel a conveyance made by one citizen of the State of Oklahoma to another, why would it not be sufficient authority to institute a suit to prevent the enforced sale upon a prior debt of a homestead selected out of the public lands?

Almost every state in the Union has a homestead law which exempts from enforced sale a certain amount of land reserved as a homestead for the protection of the family. It is the declared policy of the states to protect the family against the incompetency and financial embarrassments of the husband. Such policy of protection is, perhaps, the most deeply rooted of any declared policy in any state. Could the state maintain an action in its own name to prevent the enforced sale of such homestead in violation of a constitutional or statutory provision? The alienation of lands by minors is generally prohibited. May the state bring suits in its own name to enforce its policy of protection to minors for the purpose of setting aside a conveyance made by a minor? Such proceeding is unheard of in legal lore. Yet, would there not be more reason for sustaining such an action than for sustaining the action at bar?

Married women in many states are prohibited from conveying their real estate except upon certain conditions and under certain limitations. Could the state maintain an action in its own name to set aside a conveyance made by a married woman for the purpose of enforcing its policy of protection?

Special legislation has been enacted in most states for the protection of idiots and insane persons and their estates. It is, no doubt, the avowed policy of every state to prevent idiots

and insane persons from conveying their property. May a state, to enforce its policy, bring a suit to set aside conveyances so made? We know of no such proceeding, nor do we believe that the courts of any state in the Union would entertain such an one.

There are hundreds of laws enacted by the state in the exercise of its police powers, and, no doubt, always it is the express policy of the state that such laws shall be observed. Many of them affect or control the ordinary every-day transactions of life. No one will insist that the state could, as between its citizens, institute a suit in its own name to revoke any contract or conveyance, in the making of which the parties failed to observe the provisions of any law of the state.

The Act of May 27th, 1908.

We can perhaps do no better than preface our discussion of this subject with a quotation from the opinion of Judge Campbell in disposing of this phase of the matter in the trial court and of Judge Adams in his dissenting opinion in the Circuit Court of Appeals.

We quote as follows from the opinion of Judge Campbell in case of *United States v. Allen et al*, 171 Federal 907, 13:

"In the Act of Congress approved May 27, 1908 (35 Stat. 314, c. 199), relative to removal of restrictions, is found the following provision:

"Nothing in this Act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the

Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this Act.'

It is contended that this provision confers upon complainant authority to institute and maintain these suits in the name of the United States. The dominant purpose of this provision seems to be to preclude any such construction of the Act as would deny the United States the right to bring such suits referred to, rather than to confer such right. The bill, as originally introduced, did not contain this provision. On February 10, 1908, at the same session, a bill was introduced by Mr. Sherman, in the House, and Senator Clapp, in the Senate, specifically conferring upon the Attorney General the right to bring such suits in the name of the United States, 'for the use and benefit and on behalf of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes, or any enrolled member of either thereof.' This bill covers over six pages, providing in detail for the conduct of such suits, and also providing for the transfer from the state to the federal courts of such suits in which the United States may become a party, as provided in the bill. This bill did not become a law. After its introduction, and while the Committee on Indian Affairs was considering the Act of May 27, 1908 (35 Stat. 312, c. 199), the Assistant Attorney General for the Interior Department appeared before the committee (Report of Committee on Indian Affairs of March 20, 1908), stating that the department was in favor of the bill under consideration, but calling attention to the jurisdictional bill above referred to, saying that:

'The Department believes that some provision for jurisdiction should be passed with the other bill, for these reasons, briefly, that, if it is not necessary, it could do no damage.'

He then referred to a number of cases arising in the state courts, wherein he deemed it advisable that provision be made for removal to the Federal Court. He said:

'The Department feels that if the restrictions bill should be passed separately that there would be no possible chance, perhaps, to enact this other bill, because the term is approaching its end, and it is very difficult to get any legislation where there is any direct, active opposition to

it. That being the history of such efforts, it is the feeling of the Department that the two should be passed together.'

Then followed a lengthy discussion between the representatives of the Department and members of the committee relative to incorporating such jurisdictional provisions. It was conceded that without such provision the existence of the authority and jurisdiction was not without question, the Assistant Attorney General insisting, however, that it already existed. Three of the Oklahoma representatives on the committee opposed the incorporation of a measure granting additional jurisdiction, insisting that only such powers and jurisdiction as already existed by virtue of the Enabling Act and other legislation should be exercised by the Federal Government, and conceded that, if they existed, their exercise was proper. Finally the paragraph now being considered was incorporated.

The jurisdiction bill which failed was one positively and specifically conferring the authority and jurisdiction as if they had not theretofore existed. This provision is negative in its terms, not purporting to confer the right, but disavowing any intention to deny the same. Therefore it can hardly be said that these eleven lines were incorporated in this bill in lieu of the jurisdiction bill containing over six pages. In view of this legislative history, it is my opinion that it was only intended by this paragraph to provide that, if by existing legislation the United States had authority to institute and maintain such suits, it was not the desire nor the intention of Congress for this Act to deny it, and it should not be so construed.

It is urged that the appropriation of money for such suits is a legislative recognition of their validity. In my judgment, it cannot be so construed in this case. It is the expressed purpose of Congress not to deny the right if it existed. A refusal to provide money for the conduct of such suits would have prevented their institution and maintenance, resulting the same as a denial of the right. Hence the appropriation. The authority of the complainant to maintain these suits, if it exists, must be found elsewhere."

We also quote from the dissenting opinion of Judge Adams in the case of *United States v. Allen et al*, 179 Federal 13, 24, as follows:

"The foregoing considerations, in my opinion, indicate that Congress has adopted a new policy concerning these Indians, namely, the promotion of self-reliance, self-respect, economy and thrift, and to this end, after making the special provision above indicated and perhaps others of like character, has left them otherwise subject to general laws governing all citizens. Equality of opportunity is all an American citizen ought to demand; and this and more in the respects just indicated Congress has given the members of the Five Civilized Tribes. With these special provisions made in their behalf the legislative intent and purpose seems to have been to leave them to justify their right to citizenship by coping with other citizens in the affairs of life on an equal footing without the expectation or hope of other special governmental intervention. Such intervention in the way of institution of suits at wholesale as done in these cases, without the request or consent of the Indians, is not only humiliating in itself, but tends to defeat the true national policy by discouraging self-reliance and independence of action. The policy of encouraging and aiding the Indians to act for themselves independently, rather than of aggressively interfering, without their consent, to assert their statutory rights is distinctly recognized, if not commanded, in Section 6 of the Act of May 27, 1908, above cited. Section 1 of that Act as already pointed out imposes certain restrictions upon the alienation of lands by the Indians. Section 6, after authorizing the Secretary of the Interior or his representatives to take special interest in behalf of minors under guardianship, enacts that:

'Said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands, of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land, he shall, without charge, except the necessary court and recording fees and expenses, if any, in

the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other incumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.'

Notwithstanding other provisions of the Act referred to in the opinion of the majority, I think the part just quoted manifests a clear legislative intent and purpose that the United States, by and through the Secretary of the Interior, should act with respect to the violation of restrictions primarily in an advisory way, and instead of ever bringing suit in its own name at pleasure, should bring them only when requested by allottees, and then only in their names. If these suits can be maintained, it is not apparent where the Government can stop in its litigation in behalf of private persons in the enforcement of national policies. There are certainly many recognized policies besides the Indian policy which might be materially subverted by the practice of governmental intervention as in this case. Where would it end? In my opinion, the judgment below should be affirmed."

It is patent to the most casual observer that if protection to the Indian allottees is what the Department is really seeking, that ample provision is made therefor in Section 6 of said Act, independently of any right to maintain a suit by the United States to cancel the conveyances involved. Such provision having been made and Congress having declined to give the right asserted, is it not a more reasonable assumption that Congress intended for the Department to exercise the right granted and not to exercise the right which it refused to grant?

It seems to us that the learned judge who rendered the opinion for the majority of the court in the Circuit Court of Appeals has made an unjustifiable application of one of the paragraphs of said Act, to-wit, the concluding paragraph of

Section 6. The other, and we think controlling, provisions of said Act are ignored and are given no effect whatever. He proceeds, if we interpret his language correctly, to hold that the language, "Nothing in this Act shall be construed as a *denial* of the United States to take such steps as may be necessary," etc., operates to confer not only authority upon the United States to maintain an action in its own name, but jurisdiction upon the Circuit Court of the United States to entertain the same. The result of the language used is in effect to say that a declaration that the provisions of the Act shall not operate as a *denial* of a certain right is the equivalent of a positive *grant* of the *right*. Not only this, but the effect of the decision is to go further, and confer jurisdiction upon the Circuit Court to entertain a suit which the learned judge decides has been by a *negative* provision *affirmatively* granted.

We most respectfully insist that this interpretation of the statute is neither natural, plausible, nor justified by the context or the history of the Act.

During the consideration of the Act of May 27, 1908, the Secretary of the Interior sent to Senator Clapp, chairman of the Senate Committee on Indian Affairs, a proposed Section 2 of said Act, which read as follows:

"That any suit or suits provided for in this Act may be instituted in any court of the State of Oklahoma where jurisdiction over the subject matter and person may be had according to the laws of said state, or in the Circuit Court of the United States for the Eastern District of Oklahoma, and the said Circuit Court of the United States is hereby given jurisdiction, concurrent with the courts of said state, in any and all of the suits and proceedings authorized by this Act, without regard to the amount in controversy."

This proposed draft was accompanied by a letter giving the reasons why it was insisted the provisions ought to become a law. The departments seeking legislation insisted upon the

enlargement of the jurisdiction of the Circuit Court by a distinct and definite provision. Such enlargement of jurisdiction was resisted, the final result being nothing more than a declaration that the Act itself could not operate as a denial of jurisdiction.

We respectfully submit that the interpretation of the Act by Judges Adams and Campbell is the correct one. We doubt seriously, notwithstanding the language of this Court in the case of *Tiger v. Investment Company*, if it lies within the power of Congress under the Constitution to confer jurisdiction upon a Circuit Court of the United States to entertain a suit by the United States in its name and on behalf of, but over the objection of, a citizen of Oklahoma touching his property or contract rights, and this notwithstanding the reservations in the Enabling Act. The power of Congress in this particular rests on the eighth section of Article 2 of the Federal Constitution. This provision is as follows:

"The Congress shall have power * * * to regulate commerce with the foreign nations and among the several states and with the Indian tribes. * * *"

We most earnestly protest that the authorization, even if attempted, to bring a suit in the name of the United States for and on behalf of a citizen of the State of Oklahoma, over his protest and objection, or without his consent, is not a regulation of commerce with an Indian tribe. And we further respectfully submit, in view of the decision in the case of *Coyle v. Smith*, 31 Sup. Ct. Rep. 688, *Advance Sheets*; *Pollards, Lessee, v. Hagan*, 3 How. 212-235; *Escamba v. Chicago*, 107 U. S. 678; *Bolln v. Neb.*, 176 U. S. 83, and *Dick v. U. S.*, 208 U. S. 340, that an agreement between the United States and the State of Oklahoma, that such might be done, would be violative of the Federal Constituion and void. To say that Congress would have such right because the citizens affected

thereby happen to be of Indian ancestry, either direct or remote, would be to hold to the right of Congress to legislate in regulation of the ordinary affairs of the citizens of the State of Oklahoma who happen to be of Indian descent for all time to come. We do not believe such authority exists under the Constitution or that it was the purpose of Congress by the passage of the Act of May 27, 1908, to provide for the exercise of such authority. It might as well be contended that the allowance by Congress of an appeal from the Circuit Court of Appeals of the Eighth Circuit from orders reversing judgments of the trial court which immediately followed the action of the Circuit Court of Appeals reversing the judgment of the trial court in this case was a declaration by Congress that it did not intend to confer such jurisdiction, as to hold that the provisions of the Act of May 27, 1908, or elsewhere, making an appropriation for the maintenance of suits, conferred such jurisdiction upon Circuit Courts.

There Is a Defect of Parties.

The allottees are indispensable parties:

(1) They own the lands involved and have such an interest in the subject matter of the controversies that final decrees cannot be made without affecting their interest.

(2) The causes of action, if any, are theirs; they have the right to conduct suits either in the state or federal courts to test the validity of the conveyances sought to be canceled. Perhaps many of them now have actions in the state courts to cancel the conveyances attacked here. Decrees in the cases at bar can have no effect as between the purchasers and the allottees. Estoppel by judgment must be mutual. These cases cannot make an end of the litigation.

(3) If the United States had the right to maintain these suits the same right would be co-existent in the allottees, and for this reason they must be made parties.

(4) Every party to a contract except one who has released his interest or an agent through whom the title has passed is an indispensable party to set it aside.

(5) If the allottees are not made parties and it should be held that any of the conveyances are void the final determination may be wholly inconsistent with equity and good conscience on account of the allottees retaining the consideration paid by the purchasers and still in the hands of the allottees, and on account of the taking without recompense of the improvements made by the purchasers in good faith, which improvements have imparted value to the lands.

(6) If Indians or freedmen have made void conveyances covering their lands the situation is analogous to that of void conveyances of family homesteads made inalienable by state laws, or void conveyances by the insane or other incompetents—the sovereignty has no right or duty to cancel such conveyances, this right reposing both by natural justice and constitutional law in the owners of the lands or their legal representatives.

(7) Section 6 of the Act of May 27, 1908, clearly provides that the Secretary of the Interior shall act only in an advisory way for the allottees whose lands are restricted, and that his representatives shall, when necessary, bring suit in the names of the allottees without charge for legal service, instead of the Secretary bringing suits in the name of the United States at wholesale without the request or consent of the allottees.

In the case of *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 826, Mr. Justice Miller, delivering the opinion of the court, said:

"The learning on the subject of parties to suits in chancery is copious, and within a limited extent the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that, while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such that if their interest and their absence are formally brought to the attention of the court it will require them to be made parties if within its jurisdiction, before deciding the case. But if this cannot be done it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties that their legal presence as parties to the proceedings is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to the jurisdiction.

This class cannot be better described than in the language of this Court in *Shields v. Barrow*, 17 How. 130 (15 L. Ed. 158), in which a very able and satisfactory discussion of the whole subject is had. They are there said to be 'persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.'"

In *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed., p. 187, the Court used this language:

"* * * The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First. Where a person will be directly affected by a

decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Second. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Third. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

In *Ribon v. Railroad Companies*, 16 Wall. 446, 21 L. Ed. 368, the rule for indispensable parties is thus presented:

"The rule in equity as to parties defendant is that all whose interests will be affected by the decree sought to be obtained must be before the court; and if any such persons cannot be reached by process (do not voluntarily appear, or from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties) the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and those absent are inseparable, the obstacle is insuperable. The Act of Congress of 1839 and the rule of this Court upon the subject give no warrant for the idea that parties whose presence was before indispensable could thereafter be dispensed with. The subject was fully considered in *Shields v. Barrow*, 17 How. 130 (58 U. S., XV., 158). What is there said need not be repeated."

In *Mallow v. Hinde*, 12 Wheat. 198, 6 L. Ed. 599, the reason underlying the rule for indispensable parties is stated thus:

"In this case the complainants have no rights separable from and independent of the rights of persons not made parties. The rights of those not before the court lie at

the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.

We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

In *Chadbourn v. Coe*, 51 Fed. 479, the Circuit Court of Appeals for the Eighth Circuit summarized the rules of equity practice as to parties as follows:

"* * * 'Necessary parties' are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Such persons must be made parties, if practicable, in obedience to the general rule which requires all persons to be made parties who are interested in the controversy, in order that there may be an end of litigation; but the rule in the federal courts is that if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may proceed to a final decree between the parties before the court, leaving the rights of the absent parties untouched, and to be determined in any competent forum. The reason for this liberal rule in dispensing with necessary parties in the federal courts will be presently stated. 'Indispensable parties' are those who not only have an interest in the subject matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Shields v. Barrow*, 17 How. 139; *Ribon v. Railroad Cos.*, 16 Wall. 450; *Coiron v. Milaudon*, 19 How. 113; *Williams v. Bankhead*, 19 Wall. 563;

Kendig v. Dean, 97 U. S. 423; *Alexander v. Horner*, 1 McCrary 634.

The general rule as to parties in chancery is that persons falling within the definition of 'necessary parties' must be brought in, for the purpose of putting an end to the whole controversy, or the bill will be dismissed, and this is still the rule in most of the state courts. But in the federal courts this rule has been relaxed. The relaxation resulted from two causes: First, the limitation imposed upon the jurisdiction of these courts by the citizenship of the parties, and, secondly, their inability to bring in parties, out of their jurisdiction, by publication. The extent of the relaxation of the general rule in the Federal Court is expressed in the forty-seventh equity rule. That rule is simply declaratory of the previous decisions of the Supreme Court on the subject of the rule. The Supreme Court has said repeatedly that, notwithstanding this rule, a Circuit Court can make no decree affecting the rights of an absent person, and that all persons whose interests would be directly affected by the decree are indispensable parties. *Shields v. Barrow*, *supra*; *Ribon v. Railroad Cos.*, *supra*; *Coiron v. Millaudon*, *supra*; *Alexander v. Horner*, *supra*; *Cole S. M. Co. v. Virginia & G. H. W. Co.*, 1 Sawy. 685."

The allottees are parties in interest. They own the lands involved. All except the Seminoles have their patents. The Seminoles have a perfect equity in their lands; they have long since received their allotments, and certificates have issued therefor; they have taken possession of their lands and performed every duty upon their part to be performed. Patents should have been delivered to them long ago and are now withheld by those who ought to deliver them, though executed and ready for delivery. The allottees are therefore principally and fundamentally interested. They are the only parties to be benefited by the decrees if the Government wins. They are the parties against whom the purchasers of lands involved desire a judgment that will be binding. Their rights are to be determined. If void conveyances have been made by the allottees,

and on account thereof their titles are clouded and the use and possession of their lands lost for the time being, then their wrongs are to be redressed, their rights restored. It is clear that the Government cannot conduct litigation for and bind the citizens of the United States and citizens of Oklahoma who are owners of the fee simple title of their lands without their presence in court. It is equally clear that heretofore the Government has never maintained suits in the interest of Indians except in cases where it had some title, legal or equitable, to protect or a duty of a trust character to perform, and in all such cases the Indians were bound by the result. To meet this difficulty the majority of the court below provided by judicial discovery a ground for the Government's actions never invoked heretofore, as was stated in the dissenting opinion by Judge Adams:

"With no title, legal or equitable, to protect, and no duty of a trust character to perform, a new head of equity jurisdiction had to be discovered to justify the maintenance of these suits by the Government, and this it is claimed is found in the obligation of the Government to enforce a great national policy."

The United States cannot have rights in these cases separable from and independent of the rights of the allottees who are not made parties. The rights of the allottees who are not before the court lie at the very foundation of the claim of right by the United States, and therefore the attempted distinction between the rights of the allottees and the rights sought to be enforced by the Government in these cases is not real. As was stated in *Mallow v. Hinde*, *supra*:

"The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and final decision cannot be made. * * * We put it on the ground that no court can adjudicate directly upon a person's rights without the party being either actually or constructively before the court."

The right of the owners of the land involved to conduct suits in their own names either in the state or federal courts to determine the validity of these conveyances is conceded. It is a matter of common knowledge that allottees are now conducting such suits for themselves in the state courts of Oklahoma. There they seek the cancellation of some of the deeds here involved. Their suits will result in judgments binding upon both vendors and purchasers. Decrees in the cases at bar will affect only the purchasers, if they can have any effect at all. The pendency of the suits here is not even a bar to the prosecution of those there. Decrees against the United States in these cases could not be set up as defense there. Here the merits of the cases as to the allottees individually are not involved; there the merits of the controversies in the cases at bar are involved as to the allottees. If these cases by the United States progress to final decrees doubtless many of the allottees will claim, as is true, that the so-called classification of the Indian lands as to alienability is more fanciful than real; that there are many questions of alienability involved which will not be properly presented to the court for adjudication in these cases. Therefore the litigation will continue and become more and more burdensome and oppressive to *bona fide* purchasers of lands in the territory heretofore that of the Five Civilized Tribes.

If the United States had the right co-existent with the allottees to sue it would nevertheless be necessary to bring them before the court. Bates on Federal Equity Procedure, at Section 40, says:

“And ‘the principle that persons having co-existent rights with the plaintiff to sue the defendant must be brought before the court in all cases where the subject matter of the right is to be litigated in equity is not confined to cases where such co-existent rights to sue are at law; it applies equally to cases where another person has a right

to sue for the matter in equity; in such cases the defendant is equally entitled to insist that persons possessing such a right should be brought before the court before any decree is pronounced, in order that such right may be bound by the decree.' The rules apply whether the legal or equitable right to sue extends to the whole or only a portion of the subject of the suit."

Every party to a contract of sale except one who has released his interest or an agent through whom the title has passed is a necessary party to set it aside.

- Shields v. Barrow*, 17 How. 130.
Coiron v. Millaudon, 19 How. 113.
Gaylords v. Kelshaw, 1 Wall. 81.
Ribon v. Railroad Cos., 16 Wall. 446.
Lawrence v. Wirtz, 1 Wash. C. C. 417.
Tobin v. Walkinshaw, 1 McAll. 26.
Bell v. Donohoe, 17 Fed. R. 710.
Florence E. Mach. Co. v. Singer Mfg. Co., 4 Fisher's Pat. Cas. 329; s. c., 8 Blatchf. C. C. 113.
Chadbourne v. Coe, 45 Fed. R. 822.
Empire C. & T. Co. v. Empire C. & M. Co., 150 U. S. 159.
New Orleans W. Co. v. New Orleans, 164 U. S. 471; s. c. in C. C. A., 51 Fed. R. 479.
Clark v. Great Northern Ry. Co., 81 Fed. R. 282.
 But see *French v. Shoemaker*, 14 Wall. 314.
West v. Duncan, 42 Fed. R. 430.
Smith v. Lee, 77 Fed. R. 779.

If any of the deeds taken in good faith are held to be void final decrees in these cases against the purchasers would leave matters in a condition wholly inconsistent with equity and good conscience. The bills show that large considerations passed to the vendors. It is reasonable to presume that a large part of the consideration so paid is yet in the hands of the allottees. It is fair to suppose that in many cases other property, such as realty in cities or other farm lands, were exchanged for the

lands involved. If the vendors were parties to these suits they could not retain the purchase price in their hands or other property which they have received in exchange, for he who seeks equity must do equity. If any of the conveyances are void on account of restrictions we do not claim that the Court should decree a return of the consideration as a condition precedent to the surrender of the restricted lands, but where the consideration is yet in the hands of the allottees they should be compelled to return it, and in the same suits in which they seek cancellation of their deeds. And it also seems to us clear that in every case where the parties acted in good faith the Court ought to decree a personal judgment against the allottees for the amount of the consideration, for it was paid by mistake and the consideration for the payment has failed. If the contracts were void, but in good faith, equity will impute a promise to repay.

Wrought Iron Bridge Co. v. Utica, 17 Fed. R. 316.

City of Louisiana v. Wood, 12 Otto 294, 26 L. Ed. 153.

Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040.

Tate v. Gains, (Okla.) 105 Pac. 193.

In *Wrought Iron Bridge Company v. Town of Utica*, *supra*, the Court said:

"I do not care to spend time upon a metaphysical discussion of the question whether complainant acted under a mistake of fact or a mistake of law in making this contract. * * * Payment was refused by the county on the ground that the notes and mortgage given to secure the same were void for want of power to make them. The seller filed a bill to obtain restitution of his property. * * * The bridge has not been paid for and they have, therefore, no equitable right to keep it without paying for it."

In *Tate v. Gains*, *supra*, which involved the validity of a contract made between an Indian and a purchaser of his land, providing that if the purchaser lose possession of the land on account of restrictions upon it that the Indian would restore the purchase price, the court said:

"Under the contract and the law, defendant yielded possession *in praesenti*, or from day to day, and plaintiff secured it in the same way. Such a possession creates a tenancy at will. * * * The estate may arise by implication as well as by express words. So, while the conveyance was wholly void and of no effect in itself, the possession of the grantee amounted to a tenancy at will, not made so by the void conveyance, but because out of the effort to deal came a permission to enter the land, relieving grantee of the imputation of and liability for trespass. In order to secure this possession, grantee offered, and had accepted by grantor, a certain sum of money, and within the understanding of the parties grantee was to improve the land while permitted to remain in possession. * * * There is no reason we can perceive why the defendant, having secured from plaintiff under the arrangement mentioned in this case the money and property involved, should be permitted, upon repossessing herself of the consideration therefor, to retain both. A reasonable rental is certainly all that she has a right to claim."

The obligation to do justice rests upon all persons, including Indians, and therefore if the allottees have obtained money or property without authority and without consideration the law, independent of any statute, will compel restitution or compensation, and this ought to be made in the same action and at the same time that the void contracts are canceled.

This further question will arise in the event any of the deeds are invalid: Where these allottees have received the benefit of an invalid contract and such benefit is permanent and substantial and connected with the land, adding additional

value thereto, which gives land that had no rental value great value for rental purposes, will the law permit the parties causing such benefits to accrue, believing that they acted within the pale of law, to be recompensed therefor when the allottees seek to avoid such illegal contracts? Or to put the matter in a different way: Shall the lands that were useless increase in intrinsic value and become the source of constant benefit through the *bona fide* expenditures upon the part of the purchasers without creating a legal obligation whereby the owners shall be made to compensate those who made the improvements? This situation should be disposed of as when the lands of minors have been improved under the terms of void improvement leases by the guardians. Valuable and lasting improvements have been made often in good faith under void contracts upon the lands of minors under such circumstances that the courts have treated as done that which ought to have been done, and have recompensed those who gave the land value by improvements. If proper application had been made to the probate courts for such improvement leases the request would have been granted, and, in order to do justice to the occupants under the void contracts, the law has implied a valid obligation to recompense the lessees, not for the value of the improvements but for the enhanced value of the premises. Likewise, if deeds are canceled because the lands were inalienable where the parties were in good faith, the Court should imply as done that which ought to have been done, and would have been done, perhaps, if proper application had been made to the Secretary of the Interior. And though the void deeds will be treated as nullities, the law will imply just such an obligation to pay for the enhanced value to the premises on account of the improvements as the Secretary of the Interior would have permitted the allottees to contract upon proper application to him. Where the lands had no rental value, and, on account of the improvements so made in good faith, now have a great rental value,

it should be decreed that the rentals or a part thereof be set aside each year until compensation shall have been made for the same.

Muskogee Development Co. v. Green, (Okla.) 97 Pac. 619.

White v. Brown, (Ind. T.) 38 S. W. 335.

Poplin v. Clausen, 38 S. W. 974.

Shumate v. Harbin, 15 S. E. 270.

Brockway v. Thomas, 36 Ark. 518.

Beard v. Dansby, 48 Ark. 183, 2 S. W. 701; and

Potts v. Cullum, 68 Ill. 217.

A great number of the conveyances attacked belong to classes held to be good by the Supreme Court of Oklahoma, and by the United States courts in Oklahoma, and it is not necessary to argue that the purchasers of such lands have acted in good faith. Moreover, on account of the many confusing and conflicting laws governing the lands allotted to members of the Five Civilized Tribes, it is certain that some honest persons have been misled as to the character of the conveyances to them. The contention of the Government that the lands were inalienable when the conveyances were made makes it imperative that the allottees be brought in so that there may be an end of the litigation and that purchasers may be protected both in the consideration paid and for their improvements made in good faith in the event the purchasers lose.

It is not necessary for the Government to interfere merely because void conveyances have been made upon restricted lands. If this has been done, the situation is analogous to cases where deeds have been executed upon homesteads restricted by state laws, or where void conveyances have been made by infants or insane persons. In the history of our jurisprudence it has never been held necessary, we believe, for the sovereign imposing the restrictions to interfere by suit to protect those for

whose benefit the restrictions were imposed. Few are so foolish as to knowingly violate laws against alienation of lands. The courts are ready to give relief. What the situation needs is test cases to settle questions of alienability, and not wholesale and oppressive suits.

Section 6 of the Act of May 27, 1908, provides:

"Said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands, of all their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other incumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands."

This clearly means that the Secretary of the Interior, instead of being authorized to conduct suits against purchasers of Indian lands, is authorized merely to advise and assist all allottees whose lands are restricted. His representatives in the various counties in Eastern Oklahoma are directed to institute suits, without attorney fees, for such allottees and *in their names* to remove clouds from their title.

Bill Is Devoid of Equity.

The United States cannot maintain this bill because they are wholly devoid of equity.

The United States have not offered to return the consideration paid, they are out of possession, and if the facts alleged are true, they have an adequate remedy at law. That a bill in equity is not a proper remedy for the recovery of real estate held adversely, attention is called to the opinion of this Court in *Frost v. Spitley*, 121 U. S. 552, in which it is said (p. 556):

"Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff."

In *Orton v. Smith*, 18 How. 263, Mr. Justice Grier, speaking for the Court, says in the following language:

"Those only who have a clear, legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title."

The language of the Court in this case of *Frost v. Spitley*, and *Orton v. Smith*, *supra*, is quoted with approval in *Dick v. Forraker*, 155 U. S. 404, 414.

In *The United States v. Wilson*, 118 U. S. 86, where the United States served numerous defendants and a demurrer was sustained and appeal taken by the United States, Mr. Justice Mathews, speaking for this Court, used the following language in disposing of the case (p. 89):

"Having the legal title, then, but being kept out of possession by the defendants holding adversely, the remedy of the United States is at law to recover possession. Equity in such cases has no jurisdiction, unless it is required to remove obstacles which prevent a successful resort to an action of ejectment, or when, after repeated actions at law, its jurisdiction is invoked to prevent a multiplicity of suits, or there are other specific equitable grounds for relief. Bills *quia timet*, such as this is, to remove a cloud from a legal title, cannot be brought by one not in possession of the real estate in controversy, because the law gives a remedy by ejectment, which is plain, adequate and complete. This is the familiar doctrine of this Court. *Hipp v. Babin*, 19 Howard 271; *Ellis v. Davis*, 109 U. S. 485; *Killian v. Ebbinghaus*, 110 U. S. 568; *Fussell v. Gregg*, 113 U. S. 550."

This case would seem to effectively dispose of the rights of the United States to maintain these actions under the general equity practice.

It is true that if the state statute provides for the bringing of a suit to quiet title by a party out of possession, that the Federal courts can administer the said remedy. The statute in force in Oklahoma upon this subject is Section 4787 of Wilson's Statutes, and is as follows:

"An action may be brought by any person in possession, by himself or tenant, of real property against any person who claims an estate, or interest therein, adverse to him, for the purpose of determining such adverse estate or interest."

Under this statute and in keeping with this provision the Supreme Court of Oklahoma has HELD that actual possession is necessary to enable a party to maintain an action to quiet title, unless the premises are vacant or unoccupied (*Christy v. Spring*, 11 Okla. 710, 69 Pac. 864), and such was the construc-

tion of the statute of Kansas before it became the statute of Oklahoma.

If the conveyances referred to are void they constitute no cloud upon the title of the owner thereof, and a bill will not lie to cancel the same, even though the other grounds of equitable jurisdiction are present. *United States v. Saunders*, 96 Federal 268; *Piersol v. Elliott*, 6 Peters 96, 101; *Rich v. Braxton*, 158 U. S. 375, 407; *Kennedy v. Hazleton*, 128 U. S. 667, 672; *Town of Venice v. Woodruff*, 62 N. Y. 462, 467; *Marsh, Executrix, et al v. The City of Brooklyn*, 59 N. Y. 280.

Bill of Complaint Is Multifarious.

Because of the joinder in the bill of distinct and independent matters, each of which would constitute, if the allegations were sufficient, a separate cause of action; and because of the joinder of several defendants, each holding separate, independent and distinct titles, having no connection whatever with each other, the bill is multifarious.

The reason for the rule against multifariousness is, the inconvenience of mixing up distinct matters which may require different proceedings or decrees and embarrass the defendant or defendants in the proper defense of each. (Story's Equity Pleading, Sec. 280; Cooper's Equity Pleading 183.) Among the various tests by which to determine whether or not a bill is multifarious, we call attention to the following:

1. Is there any connection between the transactions referred to?
2. Would each transaction be more properly determined without reference to the others?
3. Would evidence relevant to one be wholly irrelevant to others?
4. Would separate decrees be necessary?
5. Would the relief be properly separate and exclusive as to each case and each defendant under the allegations of each of the bills?

Every one of the tests defined by the authorities as a ground for multifariousness is present. Each one of these transactions is separate and distinct and depends on proof that would in no wise affect any other; evidence relevant to one would be wholly irrelevant to the others; separate trials, different evidence and separate decrees will be necessary and the relief, if any is granted, must be separate and exclusive as to each transaction and as to each defendant. If there is a cause of action existing against thousands of persons made parties defendant to these suits, it exists in favor of thousands of other citizens of the United States. If a cause of action exists, it is not in favor of the United States, but in favor of divers citizens of the United States. These bills are brought not upon any cause of action existing in favor of appellants, but upon supposed causes of action existing in favor of several thousand citizens of the United States residing in the State of Oklahoma and elsewhere and against several thousand other citizens and residents of the State of Oklahoma. Between five and ten thousand controversies between twice that number of citizens of the United States are to be tried in a very limited number of suits. If the ten thousand defendants against whom the suits are brought owe to the ten thousand citizens of the United States on whose behalf they are brought, separate notes for \$1,000.00 each, given for the purchase price of said lands, there would be just as much reason for sustaining a joinder of defendants in a suit brought by the United States on behalf of the allottees who are citizens of the United States to recover on these ten thousand notes, as there would be to cancel the conveyances involved.

The validity of each conveyance must depend upon the facts of the individual case. That the cases can be disposed of upon questions of law will not be seriously contended by anyone who is familiar with the records. Although there is some conflict among the cases as to when a single plaintiff may main-

tain a suit against numerous defendants, it is believed in the Federal courts, at least, the law is fairly well settled by the decision in *Hale v. Allinson*, 188 U. S. 56.

This Court adopted as its exposition of the law the opinion of McPherson, District Judge, reported in 102 Federal Reporter 790, as follows:

"Thereafter a different question arose for determination, namely, can the assessment be lawfully enforced against the individual charged herewith, and in this question the interest of each stockholder is separate and distinct. The bill asserts the conclusiveness of the Minnesota decree upon the defendants, so far as the necessity for the assessment and the amount charged against each stockholder are concerned. (*Bank v. Farnum*, 176 U. S. 640.) Assuming that position to be sound (and, if I do not assume it; if these questions are still open for determination, so far as the Pennsylvania stockholders are affected, the bill must fail for want of necessary parties), it is clear that only two classes of questions remain to be decided; the first is whether a given stockholder was ever liable in such; and the second is whether, if he were originally liable, his liability has ceased, either in whole or in part. Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defense, and defenses may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defenses are put in by differing defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff who has similar claims against many persons. But as each of these persons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his co-defendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and

not they, has done nothing to discharge the liability. Suppose A to aver that his signature to the subscription list was forgery; what connection has that averment with B's contention that his subscription was made by an agent who exceeded his powers? Or with C's defense that his subscription was obtained by fraudulent representations, or with D's defense that he discharged his full liability by a voluntary payment to the receiver himself? Or with E's defense, that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defenses, having nothing in common; and upon each, the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional rights. But, even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose conveniences must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of the witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law.

We are in accord with the views thus expressed and we therefore must deny the jurisdiction of equity, so far as it is based upon the asserted prevention of a multiplicity of suits."

Mr. Pomeroy's statement of the law, in his First and Second editions, was so broad as to bring unlimited criticism. To meet the criticism upon the broad statement of the right to maintain such suits, two paragraphs were inserted in the Third Edition, being numbered 251½ and 251¾. The statement of the law as contained in Section 251½, Vol. 1, page 371, is as follows:

"Jurisdiction Not Exercised When That Would Be Ineffectual: Simplifying of the Issues Essential.—It seems desirable to further emphasize and illustrate the author's statement that in cases apparently falling within classes third and fourth, where the jurisdiction depends on the multitude of plaintiffs or defendants, 'there must be some common relation, some common interest on some common question' in order that the one proceeding in equity may really avail to prevent a multiplicity of suits. The equity suit must result in a simplification or consolidation of the issues; if, after the numerous parties are joined, there still remain separate issues to be tried between each of them and the single defendant or plaintiff, nothing has been gained by the court of equity's assuming jurisdiction. In such a case, 'while the bill has only one number upon the docket and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon the separate and distinct liability of one defendant,' in cases resembling those of fourth class, or upon the separate and distinct claim of one plaintiff, in cases resembling those of the third class. In refusing to entertain these spurious 'bills of peace,' courts of equity impose no real limitation upon their jurisdiction, which by its very definition, exists not because of multiplicity of suits, but to avoid them, when their rules of procedure can avail to that purpose; indeed they merely apply to bills of this character the ordinary rules of equity pleading relating to multifariousness."

In note to this section, on page 371, attention is called to the case of *Best v. Drake*, 11 Hare, 371, reporting a case somewhat parallel to the case at bar. The note is as follows:

"A bill in chancery was this term preferred by a widow against 500 persons, to answer what moneys they owed her husband; the bill was above 3,000 sheets of paper, to the wonder of most people; but the Lord Chancellor looking on it as vexatious, for it would cost each defendant a 100*l.* the copying out, he dismissed the bill, and ordered Mr. Newman, the concellour, whose hand was to it, to pay the defendants the charges they had been at."

Multifariousness as described by the Circuit Court of Appeals for the Fourth Circuit, in the case of *Barcus et al v. Gates*, 89 Fed. 783, 791, is as follows:

"Multifariousness arises from the fact either that the transactions which form the subject matter of the suit are so separate and dissimilar that they cannot conveniently be tried in one record, or that some defendant is able to say that as to a large part of the transactions set out in the bill he has no interest or connection whatever. A bill is not multifarious because there are several causes of action, if they grow out of the same transaction, and if all of the defendants are interested in the same rights, and the relief against each is of the same general character, the bill may be sustained."

In *Gaines v. Chew*, 2 How. 619, the Supreme Court of the United States held the following tests of multifariousness in a bill:

"In general terms, a bill is said to be multifarious which seeks to enforce against different individuals demands which are wholly disconnected. An illustration of this, it is said, if an estate be sold in lots to different persons, the purchaser could not join in exhibiting one bill against the vendor for a specific performance. Nor could the vendor file a bill for a specific performance against all the purchasers. The contracts of purchase being distinct, in no way connected with each other, a bill for a specific execution, whether filed by the vendor or vendees, must be limited to one contract."

This case is quoted with approval and this doctrine reaffirmed in the case of *Brown v. Guaranty Trust Co.*, 128 U. S. 403, 410.

The application of the principles contained in the last mentioned case would, of necessity, result in declaring the bill involved multifarious.

The Court's attention is also called to the case of *Tribbett et al v. Illinois Central Ry. Co.*, 70 Miss. 182, 12 So. 32; *Turner*

v. *City of Mobile*, an Alabama case reported in 33 Southern 132; *Van Auken v. Dammeier*, 40 Pac. 89; *Tonkins v. Craig*, 93 Fed. 885.

These cases disclose that the question of whether the bill is multifarious or not need not necessarily be determined upon the face of the bill; that consideration should be given to issues that might be made by the several defendants upon the allegations contained in the bill. If separate and individual defenses may be made by each of the defendants, then the bill is multifarious within the rule laid down in *Hale v. Allinson*. As Judge McPherson said, in dismissing the bill in the trial court:

"Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose conveniences must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions of law."

This is a perfect description of the condition of pending case. If the rule declared by Judge McPherson and approved by this Court in *Hale v. Allinson*, *supra*, is to be followed, it is difficult to see how it can be held that the bill in this case is not multifarious or that it states a cause of action upon which equitable relief may be invoked.

Referring again briefly to the issues that may be made by answer interposed by the defendants, if they are required to answer; for instance, it is suggested in the bill (and we do not believe the suggestion in the form in which it is made arises to the dignity of an allegation) that the several allottees have full blood heirs, or perhaps in some cases that the grantor is an heir and a full blood. The conveyances herein involved were

all made prior to the time Congress undertook to declare the rolls prepared by the Secretary to be conclusive of the quantum of Indian blood. It is a matter of public notoriety that of the members of the Five Civilized Tribes who are enrolled as full bloods many are not full bloods. There seems to have been prevalent an opinion at the time the enrollment was made that a full blood would perhaps fare a little better than one of less Indian blood. No doubt, in many instances, a direct issue will be raised as to the quantum of Indian blood. A full-blood Indian will have heirs, some of whom are full bloods and some of much less degree Indian blood, and this is frequently the case. This illustration, notwithstanding the contention made by the United States, that the question presented is one of law, that it is not only possible but entirely probable that a myriad of questions of fact will arise in many, if not in all, of these cases. Issues differing with each individual transaction and having no relation whatever to each other.

The Validity of the Conveyances Assailed.

It may not be amiss to say that the appellant here is a loan company, doing business in several of the Western states, including the State of Oklahoma, and that its connection with the titles involved in this action is solely that of mortgagee (not from the Indian allottee but from various persons who had purchased from the allottees after removal of restrictions for a valuable consideration, and without any fraud, misrepresentation or other actionable wrong), the transfers herein being assailed solely upon the ground that they were made in violation of the restrictions which Congress imposed upon the alienation of the allotments (Text of the opinion, page 57), and in order to properly determine whether or not these conveyances were made in violation of the restrictions we will have to examine each of the particular conveyances involved, and the only conveyances which the appellant in this cause is charged with are as follows:

Seminole County.

Mortgage.

Ella Norton, Earlsboro, Oklahoma,
to

Deming Investment Company, Oklahoma City, Oklahoma.

Loan \$80.00.

Dated October 27, 1906.

Due March 14, 1907.

No date of record.

Page 542, Book 18.

SE/4 of NE/4 Section 35; SW/4 of NW/4 Section 36, Township 10 North, Range 5 East.

Subject to mortgage to F. W. Staur of \$400.00.

Of the allotment of Lucy Bruner, age 28, Seminole Freedman, Roll No. 2066.

List No. 3.
Seminole County.
Mortgage.

James Arrowsmith, Wewoka, Oklahoma,
to

Deming Investment Company, Oklahoma City, Oklahoma.
Loan \$100.00.
Dated October 29, 1906.
Recorded December 13, 1906.
Due November 1, 1908.
Book 16, page 253.
NE/4 of NW/4 of Section 26, Township 10 North, Range 5
East.
A portion of the allotment of Daniel Barkus, age 24, Seminole
Freedman, Roll No. 2060.
SE/4 of NW/4 of Section 26, Township 10 North, Range 5
East.
A portion of the allotment of Amey Barkus, age 20, Seminole
Freedman, Roll No. 2062.
Subject to a mortgage given by John Quimby, Sam and Ella
Norton to James Arrowsmith, all of Wewoka, Oklahoma.
Loan \$500.00.
Dated October 29, 1906.
Recorded December 13, 1906.
Maturity not stated.
Book 16, page 247.

List No. 3.
Seminole County.
Mortgage.

John Quimby, Sam and Ella Norton, Earlsboro, Oklahoma,
to

James Arrowsmith, Wewoka, Oklahoma.
Loan \$500.00.
Dated October 29, 1906.
Recorded December 13, 1906.
Maturity not stated.
Book 16, page 247.
NE/4 of NW/4 Section 26, Township 10 North, Range 5 East.
A portion of the allotment of Daniel Barkus, age 24, Seminole
Freedman, Roll No. 2060.
SE/4 of NW/4 of Section 26, Township 10 North, Range 5 East.
A portion of the allotment of Amey Barkus, age 20, Seminole
Freedman, Roll No. 2062.

List No. 3.

Seminole County.
Mortgage.

Sam Norton, Ella and John Quimby, Wewoka, Oklahoma, or
Earlsboro, Okla.,
to

Deming Investment Company, Oklahoma City, Oklahoma.

Loan \$60.00.

Dated October 27, 1906.

Recorded November 27, 1906.

Due November 1, 1907.

Book 16, page 199.

SE/4 of NE/4; E/2 of SW/4 of NE/4 of Section 26, Township
10 North, Range 5 East.

With existing mortgage to M. E. Sunkel for \$300.00. A portion
of the allotment of Robin Bruner, age 32, Roll No. 2662,
Seminole Freedman.

List No. 3.

Seminole County.
Mortgage.

Sam Norton, Earlsboro, Oklahoma,
to

Deming Investment Company, Oklahoma City, Oklahoma.

Loan \$100.00.

Dated October 27, 1906.

Recorded January 26, 1907.

Maturity not stated.

Book 18, page 541.

E/2 of NE/4 Section 22, Township 10 North, Range 5 East
of the allotment of John Davis, age 24, Seminole Freed-
man, Roll No. 2616.

E/2 of NE/4 of NE/4 Section 23, Township 10 North, Range
5 East of the allotment of Ellen Sango, age 17, Seminole
Freedman, Roll No. 2641.

The above subject to a mortgage to E. E. Ford of \$500.00.

List No. 3.

Seminole County.
Mortgage.

Harry H. and Anna H. Rogers, Mounds, Oklahoma,
to
Deming Investment Company, Oklahoma City, Oklahoma.

Consideration \$70.00.
Dated December 22, 1906.
Recorded January 5, 1907.
Maturity not stated.
Book 17, page 232.

NW/4 of NE/4 Section 27, Township 8 North, Range 5 East.
Subject to mortgage to W. E. Dunaway of \$250.00. Of the al-
lotment of Lucy Sango, age 22, Seminole Freedman, Roll
No. 2654.

List No. 3.

Seminole County.
Real Estate Mortgage.

Sam and Ella Norton, Earlsboro, Oklahoma,
to
Deming Investment Company, Oklahoma City, Oklahoma.

Consideration \$80.00.
Dated October 27, 1906.
Recorded January 2, 1907.
Maturity not stated.
Book 17, page 220.

W/2 of NE/4 of Section 35, Township 10 North, Range 5 East.
Subject to a mortgage to E. E. Ford of \$400.00. Part of the
allotment of Douglass Bruner, age 28, Seminole Freedman,
Roll No. 2065.

List No. 3.
Seminole County.
Mortgage.

Charles H. Weinberg, Wewoka, Oklahoma,
to
The Deming Investment Company, Oklahoma City, Oklahoma.
Loan \$80.00.
Dated August 8, 1906.
Recorded August 17, 1906.
Due July 1, 1908.
Book 14, page 467.

S/2 of NW/4; SE/4 of NW/4 of NW/4 Section 28, Township
8 North, Range 7 East.

A portion of the allotment of Rina Davis, age 21, Seminole
Freedman, Roll No. 2364.

There were, of course, quite a number of other conveyances, some of which, at the request of the Government, have been printed in the transcript, involving other lands and parties other than the appellant, but inasmuch as there is only one of the defendants below before this Court, now on appeal, this Court will probably only consider the record as applied to that particular party.

A careful examination of the instruments above described, which are sought to be canceled, shows that they were each mortgages, that none of the mortgagors therein are the allottees of the respective tracts of land. It is further shown that all the lands involved, so far as this appellant is concerned, have been duly allotted by the Seminole Nation to various adult Seminole freedmen and that each of the conveyances were made since the Act of Congress of April 21, 1904, removing restrictions from those not of Indian blood; that is to say, the conveyances were made during the months of August, October

and December, 1906, and each conveyance only involves the surplus allotment and not the homestead of the particular allottee. Therefore, we find ourselves confronted with this legal proposition, **COULD AN ADULT SEMINOLE FREEDMAN SELL AND CONVEY HIS SURPLUS LANDS IN AUGUST, OCTOBER AND DECEMBER, 1906, FREE OF RESTRICTIONS IMPOSED BY TREATY OR ACT OF CONGRESS AND CONVEY A GOOD TITLE THERETO?**

TRIBAL TITLE.

A review of the history of the tribal title to the lands of the Seminole Nation shows that at the time the first agreement looking to their allotment in 1897 was made that the Seminole Reservation was insufficient in quantity for the use of the Seminole people and accordingly the Government obligated itself to purchase from the Creek Nation, at \$1.25 per acre, two hundred thousand (200,000) acres of land immediately adjoining the eastern boundary of the Seminole Nation and lying between the north and south forks of the Canadian River, the same to be allotted to members of the Seminole Nation as other Seminole lands (Seminole Agreement, December 6, 1897, 30 Stat. 567, Exhibit H this brief). At that time the Seminole domain consisted of two hundred thousand acres acquired under the Treaty of March 21, 1866, between the United States and the Seminole Nation (14 Stat. 755) (2 Kap. 910, Exhibit F this brief), and known as the westward half. Prior to the allotment agreement of December 16, 1897, the United States had been making effort to and did purchase this additional land for them, which was subsequently known as the eastern half of their domain. (Act of March 3, 1873, 17 Stat. 626; Act of August 5, 1882, 22 Stat. 265; Exhibits FF and FG this brief.)

The United States Circuit Court for the Eastern District

of Oklahoma, in the case of the *United States v. C. W. Crouch*, Treasurer of Seminole County, No. 1112 (not yet officially reported, but see opinion in full, Exhibit N this brief), in commenting on this title, said:

"As to the latter tract, the eastern half, it does not appear that any patent or other muniment of title was ever executed or issued by the United States to the Seminole Tribe of Indians. It is clear, however, that it was treated by the Government as a part of their national domain, the same as the westward tract, and was contemplated in the agreement of 1897, as a part of the tribal domain to be allotted in severalty to the individuals of the tribes."

By referring to the plat attached to the Senate Executive Document, No. 78 (51 Congress, first session), it will be readily seen that the lands involved herein, so far as the appellant is concerned, lie in the westward half of said Seminole Nation, except one allotment, being the allotment of Nina Davis, allottee, No. 2364, Seminole Freedman, and involving lands located in Section 28, Township 8 North, Range 7 East.

But be the law as it may on the question of what title the tribe had, if any, the status of that tribal title, so far as this action is concerned, at least, is **THAT THE UNITED STATES GOVERNMENT HAS PARTED WITH ITS TITLE BY THE ISSUANCE OF PATENTS TO THE SEMINOLE NATION.**

The first paragraph (page 5 of the printed transcript) alleges:

"Your orator shows that pursuant to the terms of the treaties entered into between your orator and the Seminole Tribe of Indians and the members thereof, your orator granted, by patent duly executed and delivered to said Seminole Tribe of Indians, certain lands located in the Indian Territory, now the Eastern District of Oklahoma. . . . The lands hereinafter in paragraph 6 described are a part of the lands aforesaid."

We, therefore, contend that the Government is estopped by the pleadings in the case to deny this fact.

"In a proper case the doctrine of estoppel applies to the Government."

5 Ency. U. S. Sup. Ct. Rep. 919.

INDIVIDUAL ALLOTMENT AND TITLE.

Under the agreement of December 16, 1897, approved by Congress July 1, 1898 (30 Stat. 567, Exhibit H this brief), and the agreement of October 7, 1897, approved June 2, 1900 (31 Stat. 250, Exhibit I this brief), the lands herein were duly allotted to the respective adult Seminole Freedmen Indians.

Page 6 of the printed transcript, paragraph 4 of the bill of complaint, alleges:

"And your orator further shows that each of the tracts of land, hereinafter in paragraph 6 described, is situated in the Eastern District of Oklahoma, and was, at the time of the transactions of sale or encumbrance mentioned in that paragraph, allotted lands of the members of the Seminole Tribe of Indians and none were lands which had been patented to individuals at the time of the transactions in question."

PATENTS.

I apprehend that it will be contended that Congress having originally provided that the deeds to the Seminoles should not be executed and delivered until the abolition of the tribal government (30 Stat. 567, 1 Kap. 664, Exhibit H hereto), that until these were actually executed and delivered, that no title passed to the allottee which could be sold.

"When the tribal government shall cease to exist, the Principal Chief last elected by said tribe shall execute, under his hand and the seal of the nation, and deliver to

each allottee, a deed conveying to him all the right, title and interest of said nation and the members thereof in and to said lands so allotted to him." (30 Stat. 567, Exhibit H.)

By Section 8 of the Act of March 3, 1903, Exhibit J hereto, it was provided,

"That the tribal government of the Seminole Nation shall not continue longer than March 4, 1906, Provided that the Secretary of the Interior shall, at the proper time, furnish Principal Chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation contained in the Act of July 1, 1898, and said Principal Chief shall execute and deliver said deeds to the individual allottees, as required by said Act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee, until further legislation by Congress, and such records shall have like effect as other public records. * * * "

Subsequent thereto and on March 2, 1906, Congress passed a joint resolution which was duly approved by the President (34 Stat. 822, Exhibit K hereto), and on April 21, 1906, an Act of Congress (34 Stat. 137-148, Exhibit L hereto), reading as follows:

"Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, that the tribal existence and present tribal government of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes or Nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law."

Section 28:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Creek and Seminole Tribes or Nations are hereby continued in full force and effect for all purposes authorized by law until otherwise provided by law. * * * "

Section 6:

" * * * Provided that the Principal Chief of the Seminole Nation is hereby authorized to execute deeds to allottees in the Seminole Nation prior to the time when the Seminole Government shall cease to exist."

Section 5:

" * * * And all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner of the Five Civilized Tribes, and when so recorded, shall convey legal title and shall be delivered, under the direction of the Secretary of the Interior, to the party entitled to receive the same."

So that after all there was authority to execute these deeds before the tribal government ceased to exist, and while it is contended that the Acts of Congress also provided that they should be recorded in the office of the Commissioner to the Five Civilized Tribes and that this has not been done, still that was a duty imposed upon the Secretary of the Interior and not on the allottee, and equity always regards that as done which ought to have been done. It will not be contended by the Government that the deeds have not been, in fact, executed, because, following the usual custom in such matters, the deeds or patents are prepared at the office of the Commissioner to the Five Civilized Tribes in Muskogee and executed by the Principal Chief or Governor of the tribe, and

are then forwarded to Washington to be approved by the Secretary of the Interior and returned for recording, the approval of the Secretary of the Interior being merely formal or a ministerial act.

It is a matter of public record that during the fiscal year ending June 30, 1907, tribal deeds for 5,917 Seminole allotments were prepared and submitted to the Secretary of the Interior for his approval. In the report of the Commissioner to the Five Civilized Tribes to the Secretary of the Interior for the fiscal year ending June 30, 1907, the following statement is made:

"During the fiscal year ending June 30, 1907, deeds were prepared covering all allotments in the Seminole Nation, except a few which were withheld for specific reasons, such as discrepancy in names, etc. All Seminole deeds were transmitted to the Department for the approval of the Secretary of the Interior during the months of January and February, 1907, and are being held by the Department."

The reason for withholding these Seminole deeds is given in a letter from the Honorable Jesse E. Wilson, Assistant Secretary of the Interior, to the Honorable Robt. L. Owen, United States Senator, dated May 20, 1908, which letter is here copied in full:

"DEPARTMENT OF THE INTERIOR.

Washington, May 20, 1908.

Subject: Patents to Seminoles.

Hon. Robert L. Owen,
United States Senate,
Washington, D. C.

Sir: The Department has received your note of May 16, submitting letter of May 12 from _____, attorney at law, Wewoka, Oklahoma, in which he says that patents in the Seminole Nation have never been delivered, and that the great doubt as to the validity of any conveyances

by the allottees before they are issued has created such a feeling of uncertainty upon the subject as to retard the growth of that country. He mentions the provisions of the Seminole agreement relating to tribal patents and asks why patents are held up and are not being delivered. You, also, ask for information on this subject.

The agreement between the United States and the Seminole Nation, approved July 1, 1898 (30 Stat. L. 567),

That all lands belonging to the Seminole tribe of Indians * * * shall be divided among the members of the tribe * * * and each allottee shall have the sole right of occupancy of the land so allotted to him, during the existence of the present tribal government, and until the members of said tribe shall have become citizens of the United States. * * *

All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void. * * *

When the tribal government shall cease to exist, the Principal Chief last selected by said tribe shall execute, under his hand the seal of the nation, and deliver to each allottee a deed conveying to him all the right, title and interest of the said nation so allotted to him, and the Secretary of the Interior shall approve said deed. * * * Each allottee shall designate one tract of 40 acres which shall by the terms of the deed, be made inalienable and non-taxable as a homestead in perpetuity.

The Act of Congress approved April 26, 1906, entitled 'An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes' (34 Stat. L. 137) provides (Section 6):

That the Principal Chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole Government shall cease to exist.

Section 5 of the same Act provides:

That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee * * * and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes and when so

recorded shall convey legal title and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same.

After the approval of this Act of Congress the Department took steps toward the issuance of patents to citizens of the Seminole Nation, but before it was ready to record or deliver any of these patents the Department learned that hundreds of the allottees of the Seminole tribe had been induced to execute what are believed by this Department to be illegal deeds covering their allotments for ridiculously small sums of money, some instruments having been executed covering tracts of 60 acres for as small sums as from \$1 to \$5, and alleged 'other valuable considerations,' so that the Department felt that the time had not arrived when the members of the tribe should be given their patents, as these adult allottees, except full bloods, may, under existing law, alienate their lands, exclusive of homesteads, as soon as title passes, which is with the recording of the deed by the Commissioner to the Five Civilized Tribes. Moreover, J. F. Brown, Principal Chief of the Nation, vigorously protested against the delivery of the patents until all clouds on titles, caused by illegal conveyances, had been removed and as a result of Mr. Brown's protest and an investigation by this Department of the conditions steps have been taken toward bringing suits in over 1,300 cases. On account of the complication created by these conditions, the Department feels that it would not be justified at this time in recording and delivering patents, because if they were recorded and the allottees thereby became empowered to sell, the cloud resting on the title would prevent their getting anywhere near what the lands are reasonably worth should they sell them.

Very respectfully,

JESSE E. WILSON,
Assistant Secretary."

It will be noted from the above letter that it is claimed by the Department of the Interior that the reason for withholding these patents was because of the fact that the Department had learned that hundreds of the allottees of the Seminole Tribe had

been induced to execute what was believed by that Department to be illegal deeds covering their allotments for ridiculously small sums of money, but it is not claimed in this bill that there was any inadequacy of consideration, as is clearly shown by reference to paragraph 4 of the bill (printed record, page 6), and as is also shown by the language of the opinion of Judge Amidon, who delivered the opinion of the Circuit Court of Appeals (page 57, printed record), the Court using this language:

"The allottees are not made parties either as plaintiff or defendants and it is not charged in the bills that the conveyances were obtained by fraud, misrepresentation, or for an inadequate consideration."

At the time of the argument of these cases before the Circuit Court of Appeals, so far as the writer is advised, the parties nor the Court did not know the reason set forth in the letter to Senator Owen by the Department for their withholding of these tribal deeds, the Department clearly recognizing by language used in the letter to Senator Owen that this class of titles were alienable. The question then arises, Was the fact that the allottee did not receive his patent before sale fatal to his conveyance or was it a mere ministerial duty and such as would not prevent his sale and conveyance of a good title? The Act of Congress of April 26, 1906 (34 Stat. 144, Sec. 19), (Exhibit L this brief), provided,

"That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of an allotment and subsequent to the removal of restrictions where patents thereafter issued, shall not be deemed or held invalid, solely because said conveyances were made prior to issuance and recording or delivery of patent or deed."

It may be contended that this legislation was retroactive in its nature and not prospective, and if so, would apply to only

those conveyances made prior to the Act. It appears to me that following the usual rules of construction of statutes, that this Act, while retroactive in its nature, is also prospective as to future transactions after the passage thereof, because all acts are prospective unless specially limited to the contrary. It was not necessary for Congress to have said that all conveyances heretofore or hereafter made, because following the usual rule of construction, as I say, all statutes are prospective and that where they are made retroactive also, it does not thereby eliminate the prospective feature of the statute. It seems clear from all the legislation on the subject that it was the intention of Congress (that the restrictions on this class being already removed) to give effect to such transactions as might be made by the allottee prior to the issuance of patent. It is a well known fact that the Commission was badly behind with its work and could not get to the issuance of patents. It also seems clear that Congress intended that the allotment certificate should be conclusive evidence of the allottee's title. Suppose, for the sake of argument, and there is nothing in the record to militate against such an illustration, that the allottee Lucy Bruner (page 42, printed record) had died after the Act of April 21, 1904, and her only heir was an adult son and that he had conveyed these lands before the patent issued, would the Government contend that it was void because the patent had not issued to the allottee? If so, let us see what position they are in under the Act of April 26, 1906 (34 Stat. 138, Exhibit L), Section 5 of which provided,

"That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee and if any such allottee shall die before such patent or deed becomes effective, the title to the lands therein described shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or to his legal assigns, as if the patent or deed issued to

the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect."

There is nothing in this record to show that the allottee was living when the conveyances sought to be set aside were made, and in the absence of such a showing the presumption always being against the pleader, is, that the allottee was dead and if dead, the land would descend and vest in the allottee's heirs or his legal assigns, without a patent. If then the title to the land would pass under a general warranty of a dead allottee, why would it not pass for a living one? Further than this, the Act of April 26, 1906, *supra*, Section 23, also provided for disposition of property by will, Section 23 reading as follows:

"Every person of lawful age and sound mind may, by last will and testament, devise and bequeath all of his estate, real and personal, and all interest therein. * * *"

This legislation shows clearly to my mind that Congress recognized that the allottee was the owner of the land and that he had such an interest therein as could be devised.

The second agreement with the Seminoles (31 Stat. 250), Section 2 thereof, provided,

"If any member of the Seminole Tribe of Indians shall die after the 31st day of December, 1899, the lands, money and other property to which he would be entitled if living, shall descend to his heirs who are Seminole citizens according to the laws of descent and distribution of the State of Arkansas. * * *"

By this legislation it is clear to me that the allottee had a title to the land whether such title was evidenced by a patent or not. The Government will probably contend that Congress

knew that these patents had not been delivered when it was considering the Act of May 27, 1908 (Public Act No. 140, Exhibit M hereto), and that knowing that the patents had not been delivered, still that they did not take any action thereon requiring the Secretary of the Interior to deliver said patents. Section 7 of that Act provides,

"That no contest shall be instituted after sixty days from the date of selection of any allotment hereafter made, nor after ninety days from the approval of this Act, in case of selections made prior thereto by or for any allottee of the Five Civilized Tribes, and as early thereafter as practicable, deed or patent shall issue therefor."

It seems to me clear that even though there had been no prior legislation with regard to the delivery of patent, that this section above quoted made it the duty of the Secretary to deliver them as early as practicable after the selection of the allotment. I contend that the issuance of the allotment certificate was a conveyance of the right to the title to the lands therein described; that it is like a partition of lands among tenants in common; the allottee already owned the land in common with other citizens and the allotment certificate was only evidence of the particular quantity and lands which were set apart to him. Suppose for illustration that A, B and C owned a tract of land as tenants in common; A brought suit against B and C for partition. The Court decreed that A have Section 1; that B take Section 2 and that C take Section 3; and then ordered the Commissioner to make them deeds for their respective tracts. The decree was analogous to the allotment certificate; the Commissioner's deed to the patent. The Commissioner's deed was only the evidence of their title and not the title, because they owned the land prior to the suit for partition. So it is here, the allottees owned the land before allotment and patent, but the Government says, "Yes, but it was

Indian lands and a deed to anyone other than the Government was void." That was probably true before the Government agreed that these lands should be allotted. On March 3, 1893, Congress passed an Act (27 Stat. 612, Section 15 thereof, Exhibit G hereto) reading as follows:

"The consent of the United States is hereby given to the allotment of lands in severalty, not exceeding 160 acres to any one individual, within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles * * * and upon the allotment of the lands held by said tribes, respectively, the reversionary interest of the United States therein shall be relinquished and shall cease."

After the Government had given its consent to the allotment as aforesaid, and the restrictions were removed, it was the same then as other lands held by tenants in common.

In the case of *Doe v. Wilson* (23 How. 457, 16 L. Ed. 584), the Court said:

"Although the Government alone can purchase lands from an Indian Nation, it does not follow that when the rights of the Nation are extinguished, an individual of the Nation who takes as private owner cannot sell his interest."

This language was quoted with approval by this Court in the case of *Jones v. Meehan* (175 U. S., page 16A, 44 L. Ed. 49).

Attention is called to the provisions as declarative of the office of the allotment certificate in the scheme of the allotment of the lands of the Five Civilized Tribes. Of this certificate, the Circuit Court of Appeals for the Eighth Circuit, in the case of *Wallace v. Adams* (143 Fed. 716; 721), said:

"The Commission, under the direction of the Secretary, constitutes a special tribunal, vested with judicial power to hear and determine the claims of all parties to allotments of these lands and to execute its judgment by the issue of allotment certificates, which constitute conveyances of the title to the lands to the parties who it decides are entitled to the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate, when issued, like a patent, to lands, is dual in its effect. It is an adjudication of the special tribunal empowered to decide the question that the party to whom it is issued is entitled to the land and it is a conveyance of the right to this title to the allottee."

U. S. v. Winona & St. Peter R. Co., 67 Fed. 103 and 948.

Like a patent, it is impervious to collateral attack.

I contend that the Secretary of the Interior, in the absence of fraud, misrepresentation or undue influence used in the allotment of the lands to the allottee or his heirs, was bound to issue these patents, at least, by April 26, 1906, and in the event he did not do so, then it would be treated in this kind of an action as though the patent had actually issued. The same rules apply in Indian matters of this kind as to the acts of the Interior Department as applied in public land matters. This was decided by the Circuit Court of Appeals for the Eighth Circuit, in the case of *Wallace v. Adams*, *supra*, in which they said:

"The jurisdiction of the Commission and of the Secretary and the effect of their action in the allotment of the lands of the Choctaw and Chickasaw Nations are the same in effect as the jurisdiction and effect of the Land Department of the United States, in the disposition of the public lands within its control."

In *Stark v. Starr*, 6 Wall. 418, 18 Law Ed. 925, Chief Justice Field says:

"The right to a patent once vested is treated by the Government, when dealing with the public lands, as equivalent to a patent issued. When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it is necessary to cut off intervening claimants. If the patent relates back to the inception of the right to it to cut off intervening claimants, with equal reason and justice, it must relate back to estop the patentee from asserting title against his grantee under warranty deed made before the patent had issued and after his right had become absolute."

Francis v. Francis, 203 U. S. 238, 51 L. Ed. 165.

"The allotment certificate when issued, like a patent to land, is dual in its effect. It is an adjudication of a special tribunal empowered to decide the question that the party to whom it issues is entitled to the land, and it is a CONVEYANCE of the right to this title to the allottee."

Wallace v. Adams, 143 Fed. 720.

In *Quincy v. Dennie*, 18 Wis. 485, it was held that an Act giving an Indian allottee a right to a patent was a sufficient authority for a sale by him and "that when the patent subsequently issued to him, it inured to the benefit of the grantee."

"The right to a patent was absolute and complete and the duty of the Secretary of the Interior to issue the patent was imperative."

Briggs v. Yash-puck-quah, 37 Fed. 135;

Jones v. Meehan, 175 U. S. 1; 44 Law Ed. 49.

"The certificates of allotment of an Indian citizen delivered is a conveyance of the land to the allottee."

Carter v. Roddie, 6 C. C. A. 3;

Wis. Central Ry. Co. v. Price Co., 133 U. S. 496; 33 Law Ed. 687;

Porter v. Parker, 94 N. W. 123;

Forsythe v. Flannagan, 6 Okla. 225.

(Okla.) *Godfrey v. Iowa Land & Trust Co.*, 95 Pac. 792;

DeGraffenreid v. Iowa Land & Trust Co., 95 Pac. 624;

McWilliams Investment Co. v. Livingston, 98 Pac. 614.

"In the progress of proceedings to acquire, under the laws of the United States, a title to public lands, the power of the Land Department over them ceases when the last official act necessary to transfer the title to the successful claimant has been performed, and IT CAN NOT WITHHOLD DELIVERY of the patents."

U. S. v. Shurtz, 102 U. S. 378; 26 Law Ed. 167.

For many years anterior to the passage of the Seminole Allotment Act, the uniform judicial and Departmental construction of the date of a patent was WHEN FIRST DUE. This allotment enactment was necessarily made with that view, both by the Indians and the Government. The above facts being true, necessarily the patents have in equity issued, though immaterial as we view it. A failure to deliver them is a mere failure to discharge a ministerial duty. If negligent, certainly the allottees are not to be charged therewith especially in these suits. For the Government can not be heard to say that it has taken advantage of its own wrongs.

"The failure of the officers to issue the patent at the time it ought to be issued does not effect the right of any person."

Leonard v. Ross, 23 Kan. 292.

RESTRICTIONS CREATED.

In the agreement with the Seminole Tribe of Indians of December 16, 1897, approved July 1, 1898 (30 Stat. 567, Exhibit H hereto), the only restrictions that have been placed upon Seminole land other than the homestead and the full-blood restrictions, neither of which is in issue in this case, was in the following language:

"All contracts for sale, disposition or incumbrance of any part of any allotment made prior to the date of patent shall be void."

The same agreement authorized the allottee to lease his allotment for a term not exceeding six years, with the approval of the Principal Chief, except for mineral purposes, which was in the following language:

"Any allottee may lease his allotment for any period not exceeding six years, the contract therefor to be executed in triplicate upon printed blanks provided by the tribal government, and before the same shall become effective it shall be approved by the Principal Chief and a copy filed in the office of the clerk of the United States Court at Wewoka."

There was a further provision for the leasing of minerals in the following language:

"No lease of any coal, mineral, coal oil or natural gas within said nation shall be valid unless made by the tribal government by and with the consent of the allottee and approved by the Secretary of the Interior. Should there be discovered on any allotment any coal, mineral, coal oil or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury, until the extinguishment of tribal government."

Then follows in the same agreement a provision with reference to the issuance of the deed or patents to allottees in the following language:

"When the tribal government shall cease to exist, the Principal Chief last elected by said tribe shall execute, under his hand and the seal of the nation, and deliver to each allottee, a deed conveying to him all the right, title and interest of the said nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed and the same shall thereupon operate as a relinquishment of the right, title and interest of the United States in and to the lands

embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee, and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and non-taxable as a homestead in perpetuity."

By the Appropriation Act of March 3, 1903 (32 Stat. 982, Exhibit J hereto), it was provided:

"SECTION 8. That the tribal government of the Seminole Nation shall not continue longer than March 4, 1906; *Provided*, that the Secretary of the Interior shall, at the proper time, furnish the Principal Chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation, contained in the Act of July 1, 1898 (30 Stat. 567), and said Principal Chief shall execute and deliver said deeds to the Indian allottees as required by said Act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee, until further legislation by Congress, and such records shall have like effect as other public records; *Provided, further*, that the homestead referred to in said Act shall be inalienable during the lifetime of the allottee, not exceeding twenty-one (21) years from the date of the deed for the allotment. A separate deed shall be issued for said homestead, and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof."

By the joint resolution of March 2, 1906 (34 Stat. 822, Exhibit K hereto), the tribal government of the Seminole and the other nations was continued in force until all the property of the tribes shall be distributed among the individual members, unless otherwise provided by law.

Shortly following this joint resolution, Congress passed "an Act to provide for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory, and for other purposes," on April 26, 1906 (34 Stat. 137-148, Exhibit L hereto), by which it was provided, in Sections 28 and 29, that the tribal existence of the Five Civilized Tribes should continue until otherwise provided by law, and by Sections 5 and 6 of said Act authority was given to the Principal Chief of the Seminole Nation to execute deeds to the allottees prior to the time when the Seminole government should cease to exist, and required that all patents or deeds to allottees should be recorded in the office of the Commission to the Five Civilized Tribes, and when so recorded should convey legal title, and that they were to be delivered, under the direction of the Secretary of the Interior, to the parties entitled to receive the same.

The above legislation comprises all that has been passed touching the question of restrictions in the Seminole Nation, as to the particular class of property involved in this litigation.

RESTRICTIONS REMOVED.

The Act of Congress in the Indian Appropriation Bill of April 21, 1904 (32 Stat. 189), provided:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed."

The question then naturally arises, Do the various lands described in the bill as against this appellant come within the purview and meaning of the above Act removing restrictions? In the first place, it is admitted by the bill that the lands herein were the lands of an allottee, for they say on pages 10, 11, 12, 13 and 14 of the printed transcript, "of the allotment

of Lucy Bruner, age 28, Seminole Freedman"; "a portion of the allotment of Daniel Barkus, age 24, Seminole Freedman"; "a portion of the allotment of Amey Barkus, age 20, Seminole Freedman"; "a portion of the allotment of Robin Bruner, age 32, Seminole Freedman"; "of the allotment of John Davis, age 24, Seminole Freedman"; "of the allotment of Lucy Sancho, age 22, Seminole Freedman"; "part of the allotment of Douglass Bruner, age 28, Seminole Freedman"; "a portion of the allotment of Rina Davis, age 21, Seminole Freedman."

So it is, therefore, admitted by the record that the allotments sought to be set aside and affecting this appellant are all Seminole Freedmen allotments.

The next question we ask ourselves is, Was a Seminole Freedman allottee a member of one of the Five Civilized Tribes?

In the outset we find, from a research of the documents connected with Congress and the Interior Department, various records as to who composed the Five Civilized Tribes of Indians. The Senate Committee made a report to Congress May 7, 1894 (Senate Report No. 377, 53d Congress, 2d session), in which it says:

"The Indian Territory contains an area of 19,785,781 acres, and is occupied by the Five Civilized Tribes of Indians, consisting of the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles."

This report has heretofore been referred to by this Court in the statement, in the case of *Stephens v. Cherokee Nation*, 174 U. S. Rep. 447, 43 Law Ed. 1042.

The report of the United States Indian Inspector for Indian Territory, on October 12, 1904, page 9, says:

"The Five Civilized Tribes comprise the Seminoles, numbering about 2,753; the Choctaws, 23,573; Chickasaws, 9,719; Cherokees, 35,255, and the Creeks, 15,359."

The annual report of the United States Indian Agent, dated August 6, 1904, page 48, says:

"The Union Agency has under its jurisdiction what are known as the Five Civilized Tribes of Indians, *viz.*, Cherokees, Choctaws, Chickasaws, Creeks and Seminoles."

The Acts of Congress (Stat. 27, page 645), being the law creating the original commission for allotment, in the margin, designates various tribes, Seminoles included, as comprising the Five Civilized Tribes in Indian Territory. This Court has held that in construing a statute it was permissible to refer to these marginal references made by the reporter of the statutes.

The final rolls of the Five Civilized Tribes of Indians has been published by the Secretary of the Interior, under the authority of Congress (34 Stat. 340), and names therein all Seminole allottees to whom allotments have been made, including the particular allottees described in the bill of complaint. In fact, nearly every Act of Congress since the Act of 1893, creating the allotting commission with reference to Indian matters in Indian Territory and Oklahoma, has referred to the Seminoles as constituting a part of the Five Civilized Tribes, and I am unable to comprehend the distinction sought to be made by the Government to the effect that the Seminoles were not one of the Five Civilized Tribes and covered by the Act of April 21, 1904. Now that we have seen that the Seminole Tribe was included in the expression, "The Five Civilized Tribes of Indians," the next question to pursue is whether or not the particular allottees under whom the appellants claim were of Indian blood. The record, pages 10, 11, 12, 13 and 14, printed Transcript, shows clearly upon its face that these allottees were not of Indian blood, but were freedmen or negroes. This Court has held that a slave negro, although a member of the Cherokee Tribe of Indians, was not, within the

meaning of the Acts of Congress, an Indian. *Alberty v. U. S.*, 162 U. S. 499, 40 Law Ed. 1051. The record, pages 10 to 15, inclusive, of the printed Transcript, also shows that the allottees were of full age, and not minors, and that the lands were not the homestead, but the surplus allotment. It seems clear to my mind that I have now brought the transactions with which the appellant is charged clearly within the language of the Act of April 21, 1904, and that the restrictions have been removed from these particular lands over two years prior to the time of the particular incumbrances to the appellant. The Interior Department of the United States Government recognized the fact that these restrictions in the Seminole Tribe on this particular class were removed long before these mortgages were executed to the appellant. The report of the United States Indian Inspector of 1904, page 37, under the title, "Alienation or Sale of Indian Allotments, Seminole Nation," said:

"Under existing laws, deeds to allotments in the Seminole Nation will not be issued until March 4, 1906, after the extinguishment of the tribal government, after which time the lands can be alienated, with the exception of a forty-acre homestead. The provisions of the last Indian Appropriation Act mentioned above (referring to the Act of April 21, 1904), as to the removal of restrictions from citizens who are not of Indian blood and from those by blood, with the approval of the Secretary of the Interior, apply also to the Seminole Nation at this time."

These reports were public records, and when any concern thought of going into business with reference to Indian allotments it obtained copies thereof and relied upon them. The appellant here is a land company, as has been said, doing business in several of the Western states, including Oklahoma. The Government, by these reports, said to them, "The restrictions in the Seminole Nation on those not minors and who are not of Indian blood, except as to homesteads, are removed." In short, establishing, it seems to me, a rule of property which

has been concurred in for a period of nearly five years before the bringing of these actions. The courts, both federal and state, have also declared that the restrictions on this class of Seminole allottees were removed after April 21, 1904.

The Supreme Court of Oklahoma, speaking through Chief Justice Williams, in the case of *Godfrey v. Iowa Land & Trust Company*, 95 Rep. 792 (Exhibit O, this Brief), said:

"A citizen of the Seminole Nation not of Indian blood, after selecting his allotment and receiving his certificate of allotment from the chairman of the Commission to the Five Civilized Tribes, as provided for in the agreement of the 16th day of December, A. D. 1897, on the part of the Seminole Tribe of Indians with the United States, heretofore by an Act of Congress of the 1st of July, A. D. 1898 (30 Stat. 567), after the removal of restrictions on the alienation of allotted land by the members of said tribe by the Act of Congress of April 21, 1904 (33 Stat. 204), when no patent has been issued or delivered to such allottee or citizen, may execute a deed or conveyance to that part of his or her allotment not designated by him or her as his or her homestead."

This construction has also been followed by Judge Campbell of the United States Circuit Court of the Eastern District of Oklahoma, in the case of *United States v. Chas. S. Crouch, Treasurer of Seminole County*, No. 1112, not yet officially reported (Exhibit N of this Brief). The court, in passing upon this question, said:

"I see no reason why the adult Seminole not of Indian blood, after the passage of this Act (April 21, 1904), was not as free to alienate his interest in his surplus allotment as the adult allottee of the same class in any other of the Five Civilized Tribes."

It seems to me that since the Department of the Interior has been holding that the restrictions are removed from this

class of Seminole allottees, as to their surplus lands, since the passage of the Act in 1904, and the further fact that the courts, both state and federal, have followed a similar line of reasoning, although there has not been a long line of authorities or considerable time has not elapsed since they commenced holding thusly, still I believe that, under the circumstances, that such a time has elapsed and that the holdings of the court and of the Department of the Interior have been so uniform on this proposition that they have thereby created within that part of the state formerly known as Indian Territory a rule of property which is applicable to these adult Seminole Freedmen allottees. The Seminole Nation consisted of something less than six thousand people, a large portion of which were adult Seminole Freedmen. Seminole County, Oklahoma, is now the same territory formerly known as the Seminole Nation. A large portion of their lands, and, in fact, practically the only lands from which the county could derive any taxes, was these Seminole Freedman allotments. These allotments have been traded, from time to time, among different parties. They are now principally all held by the white men and are, therefore, taxable. The county government is upheld principally from taxation derived from these lands. The Federal Court has held that they are taxable. The State Court has held that a sale of them prior to patent conveys good title. There is no allegation in the bill of any inadequacy of consideration, fraud, duress or of any actionable wrong, the only question being purely and simply one of restriction. We understand the rule to be that

"Where rules of property in a state are fully settled by a series of adjudications, this Court adopts the decisions of the state court."

Chicago v. Robbins, 67 U. S. 418, 17 Law Ed. 304.

Burgess v. Seligman, 107 U. S. 20, 27 Law Ed. 359.

Bacon v. N. W. Mutual Life Ins. Co., 131 U. S. 258, 33 Law Ed. 128.

If the lands involved in this action are not restricted, then the Government has no right to maintain this suit under the Act of May 27, 1908, or otherwise, and it seems to me that it becomes very essential to determine the question of restriction in order to determine the jurisdiction of the court. This doctrine has been followed in the case of the *United States v. Rundell*, 181 Fed. Rep. 887.

In conclusion, I believe that there are two propositions in this case that make it clear that this Court should reverse the Circuit Court of Appeals and should affirm the Circuit Court, and the reasons therefor are these:

1. Because the Government has no right to maintain these suits on account of public policy, guardianship or interest in the property, and
2. Because the lands are unrestricted and subject only to the jurisdiction of the state courts in actions between citizens of the State of Oklahoma.

Respectfully submitted,

ROBT. J. BOONE,
Solicitor for Appellant.

J. C. STONE and
S. T. BLEDSOE,
Of Counsel.

Exhibits.

EXHIBIT A.

Treaty With the Seminole, 1832.

May 9, 1832.

7 Stat., 368. Proclamation April 12, 1834.

The Seminole Indians, regarding with just respect the solicitude manifested by the President of the United States for the improvement of their condition, by recommending a removal to a country more suitable to their habits and wants than the one they at present occupy in the Territory of Florida, are willing that their confidential chiefs, Jumper, Fuck-a-lus-ti-had-jo, Charley Emarla, Coi-had-jo, Holati Emarla, Ya-ha-had-jo, Sam Jones, accompanied by their agent, Major Phagan, and their faithful interpreter, Abraham, should be sent at the expense of the United States as early as convenient to examine the country assigned to the Creeks west of the Mississippi river, and should they be satisfied with the character of that country, and of the favorable disposition of the Creeks to reunite with the Seminoles as one people, the articles of the compact and agreement herein stipulated at Payne's Landing, on the Ocklewaha river, this ninth day of May, one thousand eight hundred and thirty-two, between James Gadsden, for and in behalf of the Government of the United States, and the undersigned chiefs and head men for and in behalf of the Seminole Indians, shall be binding on the respective parties.

Cession to the United States of Lands in Florida, etc.

Article I. The Seminole Indians relinquish to the United States all claim to the lands they at present occupy in the Territory of Florida, and agree to emigrate to the country assigned to the Creeks, west of the Mississippi river; it being understood that an additional extent of territory, proportioned to their numbers, will be added to the Creek country, and that the Seminoles will be received as a constituent part of the Creek Nation, and be readmitted to all the privileges as members of the same.

\$15,400 to Be Paid by United States.

Article II. For and in consideration of the relinquishment of claim in the first article of this agreement, and in full compensation for all the improvements which may have been made on the lands thereby ceded, the United States stipulate to pay to the Seminole Indians fifteen thousand four hundred (15,400) dollars, to be divided among the chiefs and warriors of the several towns, in a ratio proportioned to their population, the respective proportions of each to be paid on their arrival in the country they consent to remove to; it being understood that their faithful interpreters Abraham and Cudjo shall receive two hundred dollars each of the above sum, in full remuneration for the improvements to be abandoned on the lands now cultivated by them.

Blankets, etc., to Be Supplied.

Article III. The United States agree to distribute as they arrive at their new homes in the Creek Territory west of the Mississippi river, a blanket and a homespun frock to each of the warriors, women and children of the Seminole Tribe of Indians.

Blacksmith—Annuity.

Article IV. The United States agree to extend the annuity for the support of a blacksmith, provided for in the sixth article of the treaty at Camp Moultrie, for ten (10) years beyond the period therein stipulated, and in addition to the other annuities secured under that treaty the United States agree to pay the sum of three thousand (3,000) dollars a year for fifteen (15) years commencing after the removal of the whole tribe; these sums to be added to the Creek annuities, and the whole amount to be so divided that the chiefs and warriors of the Seminole Indians may receive their equitable proportion of the same as members of the Creek confederation.

Cattle to Be Valued.

Article V. The United States will take the cattle belonging to the Seminoles at the valuation of some discreet person to be appointed by the President, and the same shall be paid

for in money to the respective owners, after their arrival at their new home; or other cattle such as may be desired will be furnished them, notice being given through their agent of their wishes upon this subject, before their removal, that time may be afforded to supply the demand.

Demands for Slaves to Be Settled.

Article VI. The Seminoles being anxious to be relieved from repeated vexatious demands for slaves and other property alleged to have been stolen and destroyed by them, so that they may remove unembarrassed to their new homes, the United States stipulate to have the same property investigated and to liquidate such as may be satisfactorily established provided the amount does not exceed seven thousand (7,000) dollars.

Indians to Remove Within Three Years.

Article VII. The Seminole Indians will remove within three (3) years after the ratification of this agreement, and the expenses of their removal shall be defrayed by the United States, and such subsistence shall also be furnished them for a term not exceeding twelve (12) months after their arrival at their new residence, as in the opinion of the President their numbers and circumstances may require, the emigration to commence as early as practicable in the year eighteen hundred and thirty-three (1833), and with those Indians at present occupying the Big Swamp, and other parts of the country beyond the limits as defined in the second article of the treaty concluded at Camp Moultrie creek, so that the whole of that proportion of the Seminoles may be removed within the year aforesaid, and the remainder of the tribe, in about equal proportions, during the subsequent years of eighteen hundred and thirty-four and five (1834 and 1835).

In testimony whereof, the commissioner, James Gadsden, and the undersigned chiefs and head men of the Seminole Indians, have hereunto subscribed their names and affixed their seals. Done at camp at Payne's Landing on the Ocklawaha river in the Territory of Florida, on this ninth day of May,

one thousand eight hundred and thirty-two, and of the independence of the United States of America the fifty-sixth.

James Gadsden,	(L. S.)
Holati Emartla, his x mark	(L. S.)
Jumper, his x mark	(L. S.)
Fuch-ta-lus-ta-Hadjo, his x mark	(L. S.)
Charley Emartla, his x mark	(L. S.)
Coa Hadjo, his x mark	(L. S.)
Ar-pi-uck-i, or Sam Jones, his x mark	(L. S.)
Ya-ha Hadjo, his x mark	(L. S.)
Mico-Noha, his x mark	(L. S.)
Tokose-Emartla or Jno. Hicks, his x mark	(L. S.)
Cat-sha-Tusta-nuck-i, his x mark	(L. S.)
Hola-at-a-Mico, his x mark	(L. S.)
Hitch-it-i-Mico, his x mark	(L. S.)
E-ne-hab, his x mark	(L. S.)
Ya-ha-emartla Chup-ko, his x mark	(L. S.)
Moke-his-she-lar-ni, his x mark	(L. S.)

Witnesses:

Douglas Vass, Secretary to Commissioner,
 John Phagan, Agent,
 Stephen Richards, Interpreter,
 Abraham, Interpreter, his x mark
 Cudjo, Interpreter, his x mark
 Erastus Rogers,
 B. Joscan.

EXHIBIT B.

Treaty With the Creeks, 1833.

Feb. 14, 1833.

7 Stat. 417. Proclamation Apr. 12, 1834.

Articles of agreement and convention made and concluded at Fort Gibson, between Montfort Stokes, Henry L. Ellsworth and John F. Schermerhorn, commissioners on the part of the United States, and the undersigned chiefs and head men of the Muskogee or Creek Nation of Indians, this 14th day of February, A. D. 1833.

* * * *

Preamble.

Whereas, certain articles of a treaty were concluded at the city of Washington on the 24th day of January, one thousand eight hundred and twenty-six, by and between James Barbour, Secretary of War, on behalf of the United States, and the chiefs and head men of the Creek Nation of Indians, by which it is agreed that the said Indians shall remove to a country west of the Mississippi river; and whereas, the sixth article of said treaty provides as follows: "That a deputation of five persons shall be sent by them (the Creek Nation) at the expense of the United States, immediately after the ratification of the treaty, to examine the country west of the Mississippi, not within the limits of the states or territories, and not possessed by the Choctaws or Cherokees. And the United States agree to purchase for them, if the same can conveniently be done upon reasonable terms, wherever they may select, a country whose extent shall, in the opinion of the President, be proportioned to their numbers. And if such purchase cannot be thus made, it is then agreed that the selection shall be made where the President may think proper, just reference being had to the wishes of the emigrating party." And whereas, the Creek Indians aforesaid did send five persons as delegates to explore the country pointed out to them by their treaty, which delegates selected a country west of the Territory of Arkansas, lying and being along and between the Verdigris, Arkansas and Canadian rivers, and to the country thus selected a party of the Creek Indians emigrated the following year. And whereas, certain articles of treaty or convention were concluded at the city of Washington on the 6th day of May, A. D. one thousand eight hundred and twenty-eight, by and between James Barbour, Secretary of War, on behalf of the United States, and certain chiefs and headmen of the Cherokee Nation of Indians; by the second article of which convention, a country was assigned to the Cherokee Indians aforesaid, including within its boundaries some of the lands previously selected and claimed by the Creek Indians, under their treaty aforesaid. And whereas the President and Senate of the United States, for the purpose of protecting the rights secured to the Creek Indians, by their treaty stipulations, and with a view to prevent collisions and misunderstanding between the two nations, ratified and confirmed the Cherokee Treaty, on the 28th day of May, 1828, with the following

proviso, *viz.*: "Provided, nevertheless, that the said convention shall not be so construed as to extend the northern boundary of the perpetual outlet west provided for and guaranteed in the second article of said convention, north of the 36th degree of north latitude, or so as to interfere with the lands assigned, or to be assigned, west of the Mississippi river to the Creek Indians who have emigrated or may emigrate from the states of Georgia and Alabama, under the provisions of any treaty or treaties heretofore concluded between the United States and the Creek Tribe of Indians. And provided further, that nothing in the said convention shall be construed to cede or assign to the Cherokees any lands heretofore ceded or assigned to any tribe or tribes of Indians, by any treaty now existing and in force, with any such tribe or tribes." And whereas the said proviso and ratification of the Cherokee Treaty was accepted by the delegates of the Nation, then at the city of Washington, as satisfactory to them, as is shown in and by their certain instrument in writing, bearing date the 31st day of May, 1828, appended to and published with their treaty aforesaid. But afterwards, the Cherokees of Arkansas and many of those residing east of the Mississippi at the time that treaty was concluded, removed to the country described in the second article of their treaty and settled upon a certain portion of the land claimed by the Creek Indians under their treaty provisions and stipulations. And whereas, difficulties and dissensions thus arose between the Cherokee and Creek tribes about their boundary lines, which occasioned an appeal to the President of the United States for his interposition and final settlement of the question which they were unable to settle between themselves. And, whereas, the Commissioners of the United States, whose names are signed hereto, in pursuance of the power and authority vested in them by the President of the United States, met the chiefs and headmen of the Cherokee and Creek Nations of Indians in council, on the 29th ultimo; and after a full and patient hearing and careful examination of all the claims, set up and brought forward by both the contending parties, they have this day effected an adjustment of all their difficulties, and have succeeded in defining and establishing boundary lines to their country west of the Mississippi, which have been acknowledged in open council, this day, to be mutually satisfactory to both Nations.

Objects.

Now, therefore, for the purpose of securing the great objects contemplated by an amicable settlement of the difficulties heretofore existing between the Cherokee and Muskogee or Creek Indians, so injurious to both parties; and in order to establish boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians, including the Seminole Nation, who are anxious to join them, the undersigned Commissioners, duly authorized to act on behalf of the United States, and the chiefs and headmen of the said Muskogee or Creek Indians, having full power and authority to act for their people west of the Mississippi, hereby agree to the following articles:

Peace and Friendship.

Article 1. The Muskogee or Creek Nation of Indians, west of the Mississippi, declare themselves to be the friends and allies of the United States, under whose parental care and protection they desire to continue; and that they are anxious to live in peace and friendship not only with their near neighbors and brothers, the Cherokees, but with all the surrounding tribes of Indians.

Bounds of the Grants to the Creeks.

Art. II. The United States hereby agree, by and with the consent of the Creek and Cherokee delegates, this day obtained, that the Muskogee or Creek country west of the Mississippi shall be embraced within the following boundaries, *viz.*: Beginning at the mouth of the north fork of the Canadian river, and run northerly four miles, thence running a straight line so as to meet a line drawn from the south bank of the Arkansas river opposite to the east or lower bank of Grand river, at its junction with the Arkansas and which runs a course south 44 degrees west, one mile, to a post placed in the ground; thence along said line to the Arkansas, and up the same and the Verdigris river, to where the old territorial line crosses it; thence along said line north to a point twenty-five miles from the Arkansas river where the old territorial line crosses the same; thence running a line at right angles with the territorial line aforesaid, or west to the Mexico line;

thence along the said line southerly to the Canadian river or to the boundary of the Choctaw country; thence down said river to the place of beginning. The lines hereby defining the country of the Muskogee Indians on the north and east, bound the country of the Cherokees along these courses, as settled by the treaty concluded this day between the United States and that tribe.

United States Will Convey in Fee Simple.

Art. III. The United States will grant a patent in fee simple to the Creek Nation of Indians for the land assigned said Nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States; and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a Nation, and continue to occupy the country hereby assigned them.

The Whole Creek Nation and the Seminoles Interested.

Art. IV. It is hereby mutually understood and agreed between the parties to this treaty that the land assigned to the Muskogee Indians by the second article thereof shall be taken and considered the property of the whole Muskogee or Creek Nation, as well of those now residing upon the land, as the great body of said Nation who still remain on the east side of the Mississippi; and it is also understood and agreed that the Seminole Indians of Florida, whose removal to this country is provided for by their treaty with the United States dated May 9th, 1832, shall also have a permanent and comfortable home on the lands hereby set apart as the country of the Creek Nation; and they (the Seminoles) will hereafter be considered a constituent part of said Nation, but are to be located on some part of the Creek country by themselves; which location will be selected for them by the Commissioners who have signed these articles of agreement or convention.

Additional Blacksmith, Etc., to Be Furnished by United States.

Art. V. As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonial of the [their] gratification with the present amicable and satisfac-

tory adjustment of their difficulties with the Cherokees, experienced by the Commissioners, they agree on behalf of the United States to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagonmaker as soon as they may be required by the Nation, in addition to those already employed; also to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes the sum of one thousand dollars, to be expended under the direction of the President of the United States; the whole of the above grants to be continued so long as the President may consider them conducive to the interest and welfare of the Creek Indians; and the United States will also cause to be erected, as soon as conveniently can be done, four patent railway mills, for grinding corn, and will immediately purchase for them twenty-four cross-cut saws. It being distinctly understood, however, that the grants thus made to the Creek Indians by this article are intended solely for the use and benefit of that portion of the Creek Nation who are now settled west of the Mississippi.

Improvements Left to Be Paid For.

Art. VI. The United States agrees that the improvements which the Creek Indians may be required to leave, in consequence of the boundary lines this day settled between their people and the Cherokees, shall be valued with as little delay as possible and a fair and reasonable price paid for the same by the United States.

Friendly Indians May Use the Salt Plains.

Art. VII. It is hereby agreed by the Creek Nation, parties hereto, that if the saline or salt plains on the great western prairies should come within the boundaries defined by this agreement as the country of the Creek Nation, then, and in that case the President of the United States shall have the power to permit all other friendly Indian tribes to visit said salt plains and procure thereon and carry away salt sufficient for their subsistence, without hindrance or molestation from the said Creek Indians.

The Land Granted in Lieu of Former Grant.

Art. VIII. It is agreed by the parties to this convention that the country hereby provided for the Creek Indians shall be taken in lieu of and considered to be the country provided or intended to be provided by the treaty made between the United States and the Creek Nation on the 24th day of January, 1826, under which they removed to this country.

Treaty Binding When Ratified.

Art. IX. This agreement shall be binding and obligatory upon the contracting parties as soon as the same shall be ratified and confirmed by the President and Senate of the United States.

Done in open council at Fort Gibson, this 14th day of February, A. D. one thousand eight hundred and thirty-three.

Montfort Stokes	(L. S.)
Henry L. Ellsworth	(L. S.)
J. F. Schermerhorn	(L. S.)
Roly McIntosh, his x mark,	(L. S.)
Fuss-hatchie Micoe, his x mark	(L. S.)
Benj. Perryman, his x mark	(L. S.)
Hospotock Harjoe, his x mark	(L. S.)
Cowo-cogee, Maltha, his x mark	(L. S.)
Holthimotty Tustonucky, his x mark	(L. S.)
Toatkah Haussie, his x mark	(L. S.)
Istauchoggo Harjo, his x mark	(L. S.)
Chocoatie Tustonucky, his x mark	(L. S.)

Chiefs of Creek Nation.

Signed, sealed and delivered in our presence:

S. C. Stambaugh, Secretary of Commission.

M. Arbuckle, Colonel Seventh Infantry.

Jno. Campbell, Agent Creeks.

Geo. Vashon, Agent Cherokee, West.

N. Young, Major United States Army.

Wilson Nesbitt.

W. Seawell, Lieutenant Seventh Infantry.

Peter A. Carns.

Jno. Hambly, Interpreter.

Alex. Brown, his x mark, Cherokee Interpreter.

EXHIBIT C.

Treaty With the Seminole, 1833.

Mar. 28, 1833.

7 Stat., 423. Proclamation, Apr. 12, 1834.

Preamble.

Whereas, the Seminole Indians of Florida entered into certain articles of agreement with James Gadson (Gadsden), Commissioner, on behalf of the United States at Payne's Landing, on the 9th day of May, 1832; the first article of which treaty or agreement provides as follows: "The Seminoles Indians relinquish to the United States all claim to the land they at present occupy in the Territory of Florida, and agree to emigrate to the country assigned to the Creeks, west of the Mississippi river; it being understood that an additional extent of territory proportioned to their number will be added to the Creek country and that the Seminoles will be received as a constituent part of the Creek nation and be re-admitted to all the privileges as members of the same." And whereas, the said agreement also stipulates and provides that a delegation of Seminoles should be sent at the expense of the United States to examine the country to be allotted them among the Creeks and should this delegation be satisfied with the character of the country and of the favorable disposition of the Creeks to unite with them as one people, then the aforementioned treaty would be considered binding and obligatory upon the parties.

Treaty With the Creeks of Feb. 14, 1833.

And whereas a treaty was made between the United States and the Creek Indians west of the Mississippi at Fort Gibson on the 14th day of February, 1833, by which a country was provided for the Seminoles in pursuance of the existing arrangements between the United States and that tribe. And whereas the special delegation appointed by the Seminoles on the 9th day of May, 1832, have since examined the land designated for them by the undersigned Commissioners, on behalf of the United States and have expressed themselves satisfied with the same in and by their letter dated March, 1833, addressed to the undersigned Commissioners.

Commissioners Designate Land for the Seminole.

Now, therefore, the Commissioners aforesaid, by virtue of the power and authority vested in them by the treaty made

with Creek Indians on the 14th day of February, 1833, as above stated, hereby designate and assign to the Seminole tribe of Indians, for their separate future residence, forever, a tract of country lying between the Canadian river and the north fork thereof and extending west to where a line running north and south between the main Canadian and north branch will strike the forks of Little river, provided said west line does not extend more than twenty-five miles west from the mouth of said Little river. And the undersigned Seminole chiefs, delegated as aforesaid, on behalf of their nation hereby declare themselves well satisfied with the location provided for them by the Commissioners and agree that their nation shall commence the removal to their new home as soon as the Government will make arrangements for their emigration, satisfactory to the Seminole nation.

Major Phagan to Superintend Removal of Indians.

And whereas the said Seminoles have expressed high confidence in the friendship and ability of their present agent, Major Phagan, and desire that he may be permitted to remove them to their new homes west of the Mississippi; the Commissioners have considered their request and cheerfully recommend Major Phagan as a suitable person to be employed to remove the Seminoles as aforesaid, and trust his appointment will be made not only to gratify the wishes of the Indians but as conducive to the public welfare.

In testimony whereof, the commissioners on behalf of the United States and the delegates of the Seminole nation have hereunto signed their names this 28th day of March, A. D. 1833, at Fort Gibson.

Montfort Stokes,
Henry L. Ellsworth,
John F. Schermerhorn.

Seminole Delegates:

John Hicks, representing Sam Jones, his x mark.

Holata Emartta, his x mark.

Jumper, his x mark.

Coi Hadgo, his x mark.

Charley Emartta, his x mark.

Ya-ha-hadge, his x mark.

Ne-ha-tho-clo, representing Fuch-a-lusti-hadgo, his x mark.

On behalf of the Seminole Nation.

EXHIBIT D.

Treaty With the Creeks and Seminoles, 1845.

Jan. 4, 1845.

9 Stat., 821. Proclamation, July 18, 1845.

Articles of a treaty made by William Armstrong, P. M. Butler, James Logan and Thomas L. Judge, commissioners, in behalf of the United States, of the first part, the Creek tribe of Indians, of the second part; and the Seminole tribe of Indians, of the third part.

* * * *

Preamble.

Whereas, it was stipulated in the fourth article of the Creek treaty of 1833, that the Seminoles should thenceforward be considered a constituent part of the Creek nation, and that a permanent and comfortable home should be secured for them on the lands set apart in said treaty as the country of the Creeks; and whereas many of the Seminoles have settled and are now living in the Creek country, while others, constituting a large portion of the tribe, have refused to make their homes in any part thereof, assigning as a reason that they are unwilling to submit to Creek laws and government and that they are apprehensive of being deprived by the Creek authorities, of their property; and whereas repeated complaints have been made to the United States government that those of the Seminoles who refused to go into the Creek country have, without authority or right, settled upon lands secured to other tribes, and that they have committed numerous and extensive depredations upon the property of those upon whose lands they have intruded;

Now therefore, in order to reconcile all difficulties respecting location and jurisdiction to settle all disputed questions which have arisen or may hereafter arise, in regard to rights of property and especially to preserve the peace of the frontier, seriously endangered by the restless and warlike spirit of the intruding Seminoles, the parties to this treaty have agreed to the following stipulations:

The Seminoles to Settle in Any Part of the Creek Country, to be Subject Generally to the Creek Council. No Distinction Between Them Except in Pecuniary Affairs.

Article 1. The Creeks agree that the Seminoles shall be entitled to settle in a body or separately, as they please, in any part of the Creek country; that they shall make their own town regulations, subject, however, to the general control of the Creek council, in which they shall be represented; and, in short, that no distinctions shall be made between the two tribes in any respect, except in the management of their pecuniary affairs, in which neither shall interfere with the other.

Seminoles Who Have Not Removed to Creek Country to do so Immediately.

Article 2. The Seminoles agree that those of their tribe who have not done so before the ratification of this treaty shall immediately thereafter remove to and permanently settle in the Creek country.

Certain Contested Cases Concerning the Right of Property to be Subject to the Decision of the President.

Article 3. It is mutually agreed by the Creeks and Seminoles that all contested cases between the two tribes, concerning the right of property, growing out of sales or transactions that may have occurred previous to the ratification of this treaty, shall be subject to the decision of the President of the United States.

Additional Annuity of \$3,000 for Education Allowed the Creeks for Twenty Years—Education Funds, Annuities, etc., of the Creeks to be Expended in Their Own Country in Support of Certain Schools.

Article 4. The Creeks being greatly dissatisfied with the manner in which their boundaries were adjusted by the treaty of 1833, which they say they did not understand until after its execution, and it appearing that in said treaty no addition was made to their country for the use of the Seminoles, but

that, on the contrary, they were deprived, without adequate compensation, of a considerable extent of valuable territory; And moreover the Seminoles, since the Creeks first agreed to receive them, having been engaged in a protracted and bloody contest, which has naturally engendered feelings and habits calculated to make them troublesome neighbors: The United States, in consideration of these circumstances, agree that an additional annuity of three thousand dollars for purpose of education shall be allowed for the term of twenty years; that the annuity of three thousand dollars provided in the treaty of 1832 for like purposes shall be continued until the determination of the additional annuity above mentioned. It is further agreed that all the education funds of the Creeks, including the annuities above named, the annual allowance of one thousand dollars provided in the treaty of 1833, and also all balances of appropriations for education annuities that may be due from the United States shall be expended under the direction of President of the United States, for the purpose of education aforesaid.

Rations to be Issued to Such Seminoles as Remove During Removal, and the Whole Tribe to Be Subsisted for Six Months After Emigration—Those Refusing to Remove in Six Months After Ratification of This Treaty Not to Participate in Its Benefits.

Article 5. The Seminoles having expressed a desire to settle in a body on Little river, some distance westward of the present residence of the greater portion of them, it is agreed that rations shall be issued to such as may remove while on their way to their new homes; and that after their emigration is completed, the whole tribe shall be subsisted for six months, due notice to be given that those who do not come into the Creek country before the issues commence shall be excluded. And it is distinctly understood that all those Seminoles who refuse to remove and settle in the Creek country within six months after this treaty is ratified shall not participate in any of the benefits it provides; except those now in Florida, who shall be allowed twelve months from the date of the ratification of this treaty for their removal.

*The Sum of \$15,400 Provided for in the Treaty of Payne's
Landing and the \$3,000 Provided for in Said
Treaty, When to Be Paid.*

Article 6. The sum of fifteen thousand four hundred dollars provided in the second article of the Treaty of Payne's Landing shall be paid in the manner therein pointed out, immediately after the emigration of those Seminoles who may remove to the Creek country is completed; also as soon after such emigration as practicable, the annuity of three thousand dollars for fifteen years, provided in the fourth article of said treaty, and in addition thereto, for the same period, two thousand dollars per annum in goods suited to their wants, to be equally divided among all the members of the tribe.

*\$1,000 Per Annum for Five Years to Be Furnished in
Agricultural Implements.*

Article 7. In full satisfaction and discharge of all claims for property left or abandoned in Florida at the request of the officers of the United States, under promise of remuneration, one thousand dollars per annum in agricultural implements shall be furnished the Seminoles for five years.

*The Northern and Western Boundary Line of the Creeks
to Be Marked.*

Article 8. To avoid all danger of encroachment on the part of either Creeks or Seminoles upon the territory of other nations, the northern and western boundary lines of the Creek country shall be plainly and distinctly marked.

In witness whereof the said Commissioners and the undersigned chiefs and head men of the Creek and Seminole Tribes have hereunto set their hands at the Creek Agency, this fourth day of January, 1845.

WM. ARMSTRONG,
Acting Superintendent Western Territory.
P. M. BUTLER,
Cherokee Agent.
JAMES LOGAN,
Creek Agent.
THOMAS L. JUDGE,
Seminole Sub-Agent.

CREEKS:

Roly McIntosh,
 To-marth-le Micco,
 Eu-faula Harjo,
 O-poeth-le Yoholo,
 Yagee,
 Samuel Miller,
 Cot-char Tustunnuggee,
 K. Lewis,
 Tuskunar Harjo,
 Tinthlanis Harjo,
 To-cose Fixico,
 Samuel C. Brown,
 Ho-tul-gar Harjo,

Oak-chun Harjo,
 Art-tis Fixico,
 Phil Grayson,
 Chu-ille,
 Echo Emarthla,
 Pol-lot-ke,
 Kot-che Harjo,
 To-cose Micco,
 Henry Marshall,
 Matthew Marshall,
 Che-was-tiah Fixico,
 Tom Carr.

SEMINOLES:

Miccanope,
 Coah-ceo-che or Wild Cat,
 Alligator,
 Nocose Yoholo,
 Joseph Carr,
 Ar-ar-te Harjo,
 Samuel Perryman,
 O-switchchee Emarthlar,
 Talloaf Harjo,
 David Barnett,
 Jim Boy,
 *B. Marshall,
 Tinthlanis Harjo,
 Co-ah-coo-che Emarthlar,
 Thlathlo Harjo,
 E-cho Harjo,
 Co-ah-thlocco,
 Ke-sar-che Harjo,
 No cose Harjo,
 Yar-dick-ah Harjo,

Yo-ho-lo Chop-ko,
 Halleck Tustunnuggee,
 Emah-thloo-chee,
 Octi-ar-chee,
 Tus-se-kiah,
 Pos-cof-far,
 E-con-chat-te-micco,
 Black Dirt,
 Itch-hos-se Yo-ho-lo,
 Kap-pe-chum-e-coo-che,
 O-tul-ga Harjo,
 Yo-ho-lo Harjo,
 O-switchchee Emarthla,
 Ktb-bit-che,
 An-lo-ne,
 Yah-hah Fixico,
 Fus-hat-chee Micco,
 O-chee-see Micco,
 Tus-tun-nug-goo-che.

In the presence of:

J. B. Luce, Secretary to Commissioners.
 Samuel C. Brown, U. S. Interpreter.
 B. Marshall, Creek National Interpreter.
 Abraham, U. S. Interpreter for Seminoles.
 J. P. Davis, Captain U. S. Army.
 A. Cady, Captain Sixth Infantry.
 J. B. S. Todd, Captain Sixth Infantry.
 George W. Clarke.
 Jno. Dillard.
 J. L. Alexander.
 J. H. Heard.

(To the names of Indians, except those marked with an asterisk, are subjoined their marks.)

EXHIBIT E.

Treaty With the Creeks, Etc., 1856.

August 7, 1856.

11 Stats. 699, Ratified Aug. 16, 1856, Proclaimed Aug. 28, 1856.

Articles of agreement and convention between the United States and the Creek and Seminole Tribes of Indians, made and concluded at the city of Washington the seventh day of August, one thousand eight hundred and fifty-six, by George W. Many-penny, commissioner on the part of the United States; Tuck-a-barchee Micco, Echo Harjo, Chilly McIntosh, Benjamin Marshall, George W. Stidham, and Daniel N. McIntosh, commissioners on the part of the Creeks, and John Jumper, Tustenuc-o-chee, Pars-co-foe and James Factor, commissioners on the part of the Seminoles:

Preamble.

Whereas the convention heretofore existing between the Creek and Seminole Tribes of Indians west of the Mississippi river has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States; and

Whereas, the United States desires by providing the Seminoles remaining in Florida with a comfortable home west of

the Mississippi river, and by making a liberal and generous provision for their welfare, to induce them to emigrate and become one people with their brethren already west, and also to afford to all the Seminoles the means of education and civilization, and the blessings of a regular civil government; and

Whereas, the Creek Nation and individuals thereof have, by their delegation, brought forward and persistently urged various claims against the United States, which it is desirable shall be finally adjusted and settled; and

Whereas, it is necessary for the simplification and better understanding of the relations between the United States and said Creek and Seminole Tribes of Indians that all their subsisting treaty stipulations shall, as far as practicable, be embodied in one comprehensive instrument;

Now, therefore, the United States, by their commissioner, George W. Manypenny; the Creek tribe of Indians, by their commissioners, Tuck-a-batchee-Micco, Echo Harjo, Chilly McIntosh, Benjamin Marshall, George W. Stidham and Daniel N. McIntosh; and the Seminole Tribe of Indians, by their commissioners, John Jumper, Tuste-nuc-o-chee, Pars-co-fer and James Factor, do hereby agree and stipulate as follows, *viz.*:

Cession by Creeks to Seminoles.

Article 1. The Creek Nation doth hereby grant, cede and convey to the Seminole Indians the tract of country included within the following boundaries, *viz.*: Beginning with the Canadian river a few miles east of the 97th parallel of west longitude, where Ock-hi-appo or Pond creek empties into the same; thence due north to the north fork of the Canadian; thence up said north fork of the Canadian to the southern line of the Cherokee country; thence with that line west to the 100th parallel of west longitude; thence south along said parallel of longitude to the Canadian river, and thence down and with that river to the place of beginning.

Boundaries of Creek Country.

Article 2. The following shall constitute and remain the boundaries of the Creek country, *viz.*: Beginning at the mouth of the north fork of the Canadian river and running northerly four miles; thence running in a straight line so as to meet a line drawn from the south bank of the Arkansas river, oppo-

site to the east or lower bank of Grand river, at its junction with the Arkansas, and which runs a course south, forty-four degrees west, one mile, to a post placed in the ground; thence along said line to the Arkansas and up the same and the Verdigris river, to where the old territorial line crosses it; thence along said line north to a point twenty-five miles from the Arkansas river, where the old territorial line crosses the same; thence running west with the southern line of the Cherokee country, to the north fork of the Canadian river, where the boundary of the cession of the Seminoles, defined in the preceding article, first strikes said Cherokee line; thence down said north fork to where the eastern boundary line of the said cession to the Seminoles strikes the same; thence with that line, due south to the Canadian river, at the mouth of the Ockhi-appo, or Pond Creek; and thence down said Canadian river to the place of beginning.

Seminole and Creek Countries to Be Fixed, Guaranteed to Them.

Article 3. The United States do hereby solemnly guarantee to the Seminole Indians the tract of country ceded to them by the first article of this convention and to the Creek Indians the lands included within the boundaries defined in the second article hereof; and likewise that the same shall respectively be secured to and held by said Indians by the same title and tenure by which they were guaranteed and secured to the Creek Nation by the fourteenth article of the Treaty of March 24th, 1832, the third article of the Treaty of February 14th, 1833, and by the letters-patent issued to the said Creek Nation on the 11th day of August, 1852, and recorded in Volume 4 of Records of Indian Deeds in the Office of Indian Affairs, pages 446 and 447. Provided, however, that no part of the tract of country so ceded to the Seminole Indians shall ever be sold or otherwise disposed of without the consent of both tribes legally given.

No State or Territory to Pass Laws for Said Tribes—Said Countries to Be Included in Any State or Territory Without Their Consent.

Article 4. The United States do hereby solemnly agree and bind themselves that no state or territory shall ever pass

laws for the government of the Creek or Seminole Tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within or annexed to any territory or state, nor shall either or any part of either ever be erected into a territory without the full consent of the legislative authority of the tribe owning the same.

Release by Creeks of All Title to Other Lands and All Claims Against the U. S. Except, Etc.

Article 5. The Creek Indians do hereby absolutely and forever quit-claim and relinquish to the United States all their rights, title and interest in and to any lands heretofore owned or claimed by them, whether east or west of the Mississippi river, and any and all claims for or on account of any such lands, except those embraced within the boundaries described in the second article of this agreement, and it doth also in like manner release and fully discharge the United States from all other claims and demands whatsoever, which the Creek Nation, or any individual thereof, may now have against the United States, excepting only such as are particularly or in terms provided for and secured to them by the provisions of existing treaties and laws, and which are as follows, *viz.*: Permanent annuities in money amounting to twenty-four thousand five hundred dollars, secured to them by the fourth article of the Treaty of 7th of August, 1790, the second article of the Treaty of June 16th, 1802, and the fourth article of the Treaty of January 24th, 1826; permanent provision for a wheelwright, for a blacksmith and assistant, blacksmith shop and tools, and for iron and steel under the eighth article of the last mentioned treaty, and costing annually one thousand seven hundred and ten dollars; two thousand dollars per annum during the pleasure of the President for assistance in agricultural operations under the same treaty and articles; six thousand dollars per annum for education for seven years, in addition to the estimate for present fiscal year, under the fourth article of the Treaty of January 4th, 1845; one thousand dollars per annum during the pleasure of the President, for the same object, under the fifth article of the Treaty of February 14th, 1833; services of a wagon maker, blacksmith and assistant, shop and tools, iron and steel, during the pleasure of the President, under the same treaty and article, and costing one thousand seven hundred

and ten dollars annually; the last installment of two thousand two hundred and twenty dollars for two blacksmiths and assistants, shops and tools, and iron and steel, under the thirteenth article of the Treaty of March 24th, 1832, and which last it is hereby stipulated shall be continued for seven additional years. The following shall also be excepted from the foregoing quitclaim, relinquishment, release and discharge, *viz.*: The fund created and held in trust for Creek orphans under the second article of the Treaty of March 24th, 1832; the right of such individuals among the Creeks as have not received it to the compensation in money provided for by the Act of Congress of March 3d, 1837, in lieu of reservations of land to which they were entitled, but which were not secured to them under the said Treaty of 1832; the right of the reservees under the same treaty, who did not dispose of their reservations to the amounts for which they have been or may be sold by the United States; and the right of such members of the tribe to military bounty lands, as are entitled thereto under existing laws of the United States. The right and interest of the Creek Nation and people in and to the matters and things so excepted shall continue and remain the same as though this convention had never been entered into.

Payment to the Creeks for Said Cession and Release of \$1,000,000—Two Hundred Thousand Dollars to Be Invested—Four Hundred Thousand Dollars to Be Paid Per Capita—Ten Thousand Dollars for Arrears Under Act of 1837, Ch. 41—One Hundred and Twenty Thousand Dollars for Creeks Who Emigrated Before 1832—Two Hundred Thousand Dollars to Be Retained Till the Seminoles Remove and Then Paid or Invested.

Article 6. In consideration of the foregoing quitclaim, relinquishment, release, and discharge and of the cession of a country for the Seminole Indians contained in the first article of this agreement, the United States do hereby agree and stipulate to allow and pay the Creek Nation the sum of one million of dollars, which shall be invested and paid as follows, *viz.*: two hundred thousand dollars to be invested in some safe stocks, paying an interest of at least 5 per cent per annum; which interest shall be regularly and faithfully applied

to purposes of education among the Creeks; four hundred thousand dollars to be paid per capita under the direction of the general council of the Creek Nation to the individuals and members of said nation, except such portion as they shall, by order of said national council, direct to be paid to the treasurer of said nation for any specified national object not exceeding one hundred thousand dollars (\$100,000), as soon as practicable after the ratification of this agreement; and two hundred thousand dollars shall be set apart to be appropriated and paid as follows, *viz.*: ten thousand dollars to be equally distributed and paid to those individuals and their heirs who, under Act of Congress of March 3d, 1837, have received money, in lieu of reservations of land to which they were entitled, but which were not secured to them under the Treaty of March 24th, 1832; one hundred and twenty thousand dollars to be equally and justly distributed and paid under the direction of the general council to those Creeks or their descendants who emigrated west of the Mississippi river prior to said Treaty of 1832, and to be in lieu of and in full compensation for the claims of such Creeks to an allowance equivalent to the reservations granted to the Eastern Creeks by that treaty, and seventy thousand dollars for the adjustment and final settlement of such other claims of individual Creek Indians as may be found to be equitable and just by the general council of the nation: Provided, however, that no part of the three last mentioned sums shall be allowed or paid to any other person or persons whatsoever than those who are actual and *bona fide* members of the Creek Nation and belonging respectively to the three classes of claimants designated; said sums to be remitted and paid as soon as practicable after the general council shall have ascertained and designated the persons entitled to share therein. And provided further, that any balance of the said sum of seventy thousand dollars which may be found not to be actually necessary for the adjustment and settlement of the claims for which it is set apart, shall belong to the nation and be applied to such object or objects of utility or necessity as the general council shall direct. The remaining sum of two hundred thousand dollars shall be retained by the United States until the removal of the Seminole Indians, now in Florida, to the country west of the Mississippi river, herein provided for their tribe; whereupon the same, with interest thereon at 5 per cent from the date of the ratification of this agreement shall be paid over to or invested for the benefit of

the Creek Nation as may then be requested by the proper authorities thereof. Provided, however, that if so paid over, it shall be equally divided and paid per capita to all the individuals and members of the Creek Nation, or be used and applied only for such objects or purposes of a strictly national or beneficial character as the interests and welfare of the Creek people shall actually require.

Educational, Etc., Funds to be Paid to Treasurer.

Article 7. It being the desire of the Creeks to employ their own teachers, mechanics and farmers, all of the funds secured to the nation for educational, mechanical, and agricultural purposes shall, as the same become annually due, be paid over by the United States to the treasurer of the Creek Nation. And the annuities in money due the nation under former treaties shall also be paid to the same officer, whenever the general council shall so direct.

Release of Seminole Claims—Payment for Such Release.

Article 8. The Seminoles hereby release and discharge the United States from all claims and demands which their delegation have set up against them, and obligate themselves to remove to and settle in the new country herein provided for them as soon as practicable. In consideration of such release, discharge and obligation, and as the Indians must abandon their present improvements, and incur considerable expense in re-establishing themselves, and as the Government desires to secure their assistance in inducing their brethren yet in Florida to emigrate and settle with them west of the Mississippi river and is willing to offer liberal inducements to the latter peaceably so to do, the United States do therefore agree and stipulate as follows, *viz.*: To pay to the Seminoles now in the West the sum of ninety thousand dollars, which shall be in lieu of their present improvements, and in full for the expenses of their removal and establishing themselves in their new country; to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smithshops among them, said sums to be applied to these objects in such manner as the President shall direct. Also

to invest for them the sum of two hundred and fifty thousand dollars at 5 per cent per annum, the interest to be regularly paid over to them per capita as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the West, whereupon the two sums so invested shall constitute a fund belonging to the United Tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them per capita as an annuity; but no portion of the principal thus invested or the interest thereon annually due and payable shall ever be taken to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws.

United States to Remove Seminoles Who Will Emigrate, and Give Them Certain Supplies.

Article 9. The United States agree to remove comfortably, to their new country west, all those Seminoles now in Florida who can be induced to emigrate thereto; and to furnish them with sufficient rations of wholesome subsistence during their removal and for twelve months after their arrival at their new homes; also to provide each warrior of 18 years of age and upwards, who shall so remove, with one rifle-gun if he shall not already possess one; with two blankets, a supply of powder and lead, a hunting shirt, one pair of shoes, one and a half yards of strouding, and ten pounds of good tobacco; and each woman, youth and child with a blanket, pair of shoes, and other necessary articles of comfortable clothing, and to expend for them in improvements, after they shall all remove, the sum of twenty thousand dollars. And to encourage the Seminoles to devote themselves to the cultivation of the soil and become a sober, settled, industrious and independent people, the United States do further agree to expend three thousand dollars in the purchase of ploughs and other agricultural implements, axes, seeds, looms, cards, and wheels; the same to be proportionately distributed among those now West and those who shall emigrate from Florida.

Seminoles West to Send a Delegation to Florida.

Article 10. The Seminoles west do hereby agree and bind themselves to furnish, at such time or times as the President

may appoint, a delegation of such members of their tribe as shall be selected for the purpose, to proceed to Florida, under the direction of an agent of the Government, to render such peaceful services as may be required of them, and otherwise to do all in their power to induce their brethren remaining in that state to emigrate and join them in the West; the United States agreeing to pay them and such members of the Creek Tribe as may voluntarily offer to join them and be accepted for the same service a reasonable compensation for their time and services, as well as for their traveling and other actual and necessary expenses.

Payment to Certain Indians.

Article 11. It is further hereby agreed that the United States shall pay Foc-te-lus-te-harjo, his heirs or assigns, the sum of four hundred dollars, in consideration of the unpaid services of said Foc-te-luc-te-harjo, or Black Dirt, rendered by him as chief of the friendly band of Seminole warriors who fought for the United States during the Florida war.

Agency for Seminoles.

Article 12. So soon as the Seminoles west shall have removed to the new country herein provided for them, the United States will then select a site and erect the necessary buildings for an agency, including a council house for the Seminoles.

Rights of Creeks and Seminoles in Each Other's Countries.

Article 13. The officers and people of each of the tribes of Creeks and Seminoles shall, at all times, have the right of safe conduct and free passage through the lands and territory of the other. The members of each shall have the right freely to settle within the country of the other, and shall thereupon be entitled to all the rights, privileges and immunities of members thereof, except that no member of either tribe shall be entitled to participate in any funds belonging to the other tribe. Members of each tribe shall have the right to institute and prosecute suits in the courts of the other, under such regulations as may, from time to time, be prescribed by their respective legislatures.

Extradition of Criminals Between Said Indian Countries.

Article 14. Any person duly charged with a criminal offense against the laws of either the Creek or Seminole Tribe, and escaping into the jurisdiction of the other, shall be promptly surrendered upon the demand of the proper authority of the tribe within whose jurisdiction the offense shall be alleged to have been committed.

Government of Creeks and Seminoles.

Article 15. So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government and full jurisdiction over persons and property within their respective limits; excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole Tribe; and all persons not being members of either tribe, found within their limits, shall be considered intruders and be removed from and kept out of the same by the United States agents for said tribes, respectively (assisted if necessary, by the military), with the following exceptions, *viz.*: such individuals, with their families, as may be in the employment of the Government of the United States; all persons peaceably traveling or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States; and such persons as may be permitted by the Creeks or Seminoles, with the assent of the proper authorities of the United States, to reside within their respective limits without becoming members of either of said tribes.

Extradition of Criminals to the United States or States.

Article 16. The Creeks and Seminoles shall promptly apprehend and deliver up all persons accused of any crime against the laws of the United States or of any state thereof, who may be found within their limits, on demand of any proper officer of a state or of the United States.

Traders to Pay for Use of Land and Timber.

Article 17. All persons licensed by the United States to trade with the Creeks or Seminoles shall be required to pay

to the tribe within whose country they trade, a moderate annual compensation, for the land and timber used by them, the amount of such compensation, in each case, to be assessed by the proper authorities of said tribe, subject to the approval of the United States agent therefor.

Protection of Said Creeks and Seminoles.

Article 18. The United States shall protect the Creeks and Seminoles from domestic strife, from hostile invasion and from aggression by other Indians and white persons, not subject to their jurisdiction and laws; and for all injuries resulting from such invasion or aggression, full indemnity is hereby guaranteed to the party or parties injured out of the treasury of the United States, upon the same principle and according to the same rules upon which white persons are entitled to indemnity for injuries or aggressions upon them committed by Indians.

Right to Establish Posts, Roads and Agencies Reserved to the United States—Regulations Respecting the Same.

Article 19. The United States shall have the right to establish and maintain such military posts, military and post-roads, and Indian agencies as may be deemed necessary within the Creek and Seminole country, but no greater quantity of land or timber shall be used for said purposes than shall be actually requisite, and if, in the establishment or maintenance of such posts, roads, or agencies, the property of any Creek or Seminole be taken, destroyed or injured, or any property of either nation, other than land and timber, just and adequate compensation shall be made by the United States. Such persons only as are or may be in the employment of the United States in any capacity, civil or military, or subject to the jurisdiction and laws of the Creeks and Seminoles, shall be permitted to farm or raise stock within the limits of any of said military posts or Indian agencies. And no offender against the laws of either of said tribes shall be permitted to take refuge therein.

Right-of-Way for Railroads and Telegraphs.

Article 20. The United States or any incorporated company shall have the right-of-way for railroads or lines of telegraphs through the Creek and Seminole countries; but in the case of any incorporated company, it shall have such right-of-way only upon such terms and payment of such amount to the Creeks and Seminoles, as the case may be, as may be agreed upon between it and the national council thereof; or in case of disagreement by making full compensation, not only to individual parties injured, but also to the tribe for the right-of-way, all damage and injury done to be ascertained and determined in such manner as the President of the United States shall direct. And the right-of-way granted by either of said tribes for any railroad shall be perpetual, or for such shorter term as the same may be granted, in the same manner as if there were no reversion of their lands to the United States provided for in case of abandonment by them, or of extinction of their tribe.

Survey of Boundaries.

Article 21. The United States will cause such portions of the boundaries of the Creek and Seminole countries as do not consist of well defined natural boundaries to be surveyed and permanently marked and established. The Creek and Seminole general councils may each appoint a commissioner from their own people to attend the running of their respective boundaries, whose expenses and a reasonable allowance for their time and services, while engaged in such duty, shall be paid by the United States.

Amnesty Declared.

Article 22. That this convention may conduce, as far as possible, to the restoration and preservation of kind and friendly feelings among the Creeks and Seminoles, a general amnesty of all past offenses committed within their country, either west or east of the Mississippi, is hereby declared.

Allowances to Delegation.

Article 23. A liberal allowance shall be made to each of the delegations signing this convention; including, with the Seminole delegation, George W. Brinton, the interpreter, as a compensation for their traveling and other expenses, in coming to and remaining in this city and returning home.

Seminoles May Set a Tract Apart for Florida Seminoles.

Article 24. Should the Seminoles in Florida desire to have a portion of the country described in the first article of this agreement set apart for their residence, it is agreed that the Seminoles west may make such arrangement, not inconsistent with this instrument, as may be satisfactory to their brethren in Florida.

Creek Laws, Force of, in Seminole Country.

Article 25. The Creek Laws shall be in force and continue to operate in the country herein assigned to the Seminoles until the latter remove thereto; when they shall cease and be of no effect.

*This Treaty to Supersede Former Inconsistent Ones.
When to Take Effect.*

Article 26. This convention shall supersede and take the place of all former treaties between the United States and the Creeks, between the United States and the Florida Indians and Seminoles, and between the Creeks and Seminoles, inconsistent herewith; and shall take effect and be obligatory on the contracting parties from the date hereof, whenever it shall be ratified by the Senate and President of the United States.

Article 27. It is ~~is~~ further agreed that nothing herein contained shall be so construed as to release the United States from any liability other than those in favor of said nations or any individuals thereof.

In Testimony Whereof, The said George W. Manypenny, commissioner on the part of the United States, and the said commissioners on the part of the Creeks and Seminoles have hereunto set their hands and seals.

Done in triplicate at the city of Washington on the day and year first above written.

George W. Manypenny, (L. S.)

United States Commissioner.

Tuck-a-batchee-micco, his x mark. (L. S.)

Echo-harjo, his x mark. (L. S.)

Chilly McIntosh. (L. S.)

Benjamin Marshall. (L. S.)

George W. Stidham. (L. S.)

Daniel N. McIntosh. (L. S.)

Creek Commissioners.

John Jumper, his x mark. (L. S.)

Tus-te-nuc-o-chee, his x mark. (L. S.)

Pars-co-fer, his x mark. (L. S.)

James Factor, his x mark. (L. S.)

Seminole Commissioners.

Executed in the presence of:

John W. Allen.

Edward Hanrick.

W. H. Garrett, Creek Agent.

J. W. Washbourne, Seminole Agent.

G. W. Stidham, United States Interpreter.

George W. Brinton, Interpreter.

James R. Roche.

Chs. O. Joline.

EXHIBIT F.

Treaty With the Seminoles, 1866.

(March 21, 1866.)

14 Stats. 755. Ratified July, 1866. Proclaimed Aug. 1866.

Articles of a treaty made and concluded at Washington, D. C., March 21, A. D. 1866, between the United States Government, by its commissioners, D. N. Cooley, Commissioner of Indian affairs; Elijah Sells, Superintendent of Indian Affairs, and Ely S. Parker, and the Seminole Indians, by their chiefs, John Chup-co or Long John, Cho-cote-harjo, Fos-ha(r)jo, John F. Brown.

Preamble.

Whereas, existing treaties between the United States and the Seminole Nation are insufficient to meet their mutual necessities; and

Whereas, the Seminole Nation made a treaty with the so-called Confederate States, August 1st, 1861, whereby they threw off their allegiance to the United States, and unsettled their treaty relations with the United States, and thereby incurred the liability of forfeiture of all lands and other property held by grant or gift of the United States, and whereas a treaty of peace and amity was entered into between the United States and the Seminole and other tribes at Fort Smith, September 13 [10], 1865, whereby the Seminoles revoked, canceled and repudiated the said treaty with the so-called Confederate States; and whereas the United States, through its commissioners in said treaty of peace, promised to enter into treaty with the Seminole Nation to arrange and settle all questions relating to and growing out of said treaty with the so-called Confederate States; and, whereas, the United States, in view of said treaty of the Seminole Nation with the enemies of the Government of the United States, and the consequent liabilities of said Seminole Nation and in view of its urgent necessities for more lands in the Indian Territory, requires a cession by said Seminole Nation of part of its present reservation and is willing to pay therefor a reasonable price, while at the same time providing new and adequate lands for them.

Now, therefore, the United States, by its commissioners aforesaid and the above named delegates of the Seminole Nation, the day and year above written, mutually stipulate and agree on behalf of the respective parties, as follows, to-wit:

Peace and Friendship.

Article 1. There shall be perpetual peace between the United States and the Seminole Nation, and the Seminoles agree to be and remain firm allies of the United States and always faithfully aid the Government thereof to suppress insurrection and put down its enemies.

Military Occupation and Protection by the United States.

The Seminoles also agree to remain at peace with all other Indian tribes and with themselves. In return for these pledges

of peace and friendship, the United States guarantee them quiet possession of their country, and protection against hostilities on the part of other tribes; and, in the event of such hostilities, that the tribe commencing and prosecuting the same shall make just reparation therefor. Therefore, the Seminoles agree to a military occupation of their country at the option and expense of the United States.

Amnesty.

A general amnesty of all past offenses against the laws of the United States, committed by any member of the Seminole Nation, is hereby declared; and the Seminoles, anxious for the restoration of kind and friendly feelings among themselves, do hereby declare an amnesty for all past offenses against their government, and no Indian or Indians shall be proscribed or any act of forfeiture or confiscation passed against those who have remained friendly to or taken up arms against the United States, but they shall enjoy equal privileges with other members of said tribe, and all laws heretofore passed inconsistent herewith are hereby declared inoperative.

Slavery Not to Exist Among the Seminoles—Rights of Those of African Descent.

Article 2. The Seminole Nation covenant that henceforth in said nation slavery shall not exist nor involuntary servitude, except for and in punishment of crime, whereof the offending party shall first have been duly convicted in accordance with law, applicable to all the members of said nation. And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all other persons of whatever race or color, who may be adopted as citizens or members of said tribe.

*Cession of Lands to the United States—Payments by the
United States—Grants to Seminoles—Boundaries—Pay-
ments Therefor—Balance Due the Seminoles—
How to Be Paid.*

Article 3. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek Nation under the provisions of article first (1), treaty of the United States with the Creeks and Seminoles, made and concluded at Washington, D. C., August 7, 1856. In consideration of said grant, and cession of their lands, estimated at two million one hundred and sixty-nine thousand and eighty (2,169,080) acres, the United States agree to pay said Seminole Nation the sum of three hundred and twenty-five thousand three hundred and sixty-two (\$325,362) dollars, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to-wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their Treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres or land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written. The balance due the Seminole Nation after making said deduction amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to-wit: Thirty thousand dollars shall be paid to enable the Seminoles to occupy, restore and improve their farms, and to make their nation

independent and self-sustaining, and shall be distributed for that purpose under the direction of the Secretary of the Interior; twenty thousand dollars shall be paid in like manner for the purpose of purchasing agricultural implements, seeds, cows, and other stock; fifteen thousand dollars shall be paid for the erection of a mill suitable to accommodate said nation of Indians; seventy thousand dollars to remain in the United States treasury, upon which the United States shall pay an annual interest of 5 per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole Government; forty thousand three hundred and sixty-two dollars shall be appropriated and expended for subsisting said Indians, discriminating in favor of the destitute; all of which amounts, excepting the seventy thousand dollars, to remain in the treasury as a permanent fund, shall be paid upon the ratification of said treaty, and disbursed in such manner as the Secretary of the Interior may direct. The balance, fifty thousand dollars, or so much thereof as may be necessary to pay the losses ascertained and awarded as hereinafter provided, shall be paid when said awards shall have been duly made and approved by the Secretary of the Interior. And in case said fifty thousand dollars shall be insufficient to pay all said awards, it shall be distributed pro rata to those whose claims are so allowed, and until said awards shall be thus paid, the United States agree to pay to said Indians, in such manner and for such purposes as the Secretary of the Interior may direct, interest at the rate of 5 per cent per annum from the date of the ratification of this treaty.

*Board of Commissioners to Determine Losses Sustained by
Loyal Seminoles—Census of Those Loyal—No Com-
pensation Except to Loyal Indians—Awards
of Commissioners—Pay—What Claims
for Losses Included.*

Article 4. To reimburse such members of the Seminole Nation as shall be duly adjudged to have remained loyal and faithful to their treaty relations to the United States, during the recent rebellion of the so-called Confederate States for the

losses actually sustained by them, thereby after the ratification of this treaty, or so soon thereafter as the Secretary of the Interior shall direct, he shall appoint a board of commissioners, not to exceed three in number, who shall proceed to the Seminole country and investigate and determine said losses. Previous to said investigation the agent of the Seminole Nation shall prepare a census or enumeration of said tribe, and make a roll of all Seminoles who did in no manner aid or abet the enemies of the Government, but remained loyal during said rebellion; and no award shall be made by said commissioners for such losses unless the name of the claimant appear on said roll, and no compensation shall be allowed any person for such losses whose name does not appear on said roll, unless said claimant, within six months from the date of the completion of said roll, furnishes proof satisfactory to said board, or to the Commissioner of Indian Affairs, that he has, at all times, remained loyal to the United States, according to his treaty obligations. All evidence touching said claims shall be taken by said commissioners, or any of them, under oath, and their awards made, together with the evidence, shall be transmitted to the Commissioner of Indian Affairs, for his approval, and that of the Secretary of the Interior. Said commissioners shall be paid by the United States such compensation as the Secretary of the Interior may direct. The provisions of this article shall extend to and embrace the claims for losses sustained by loyal members of said tribe, irrespective of race or color, whether at the time of said losses the claimants shall have been in servitude or not; provided said claimants are made members of said tribe by the stipulations of this treaty.

Right-of-Way for Railroads Granted Through the Lands of the Seminoles—Lands Will Be Sold—Proviso.

Article 5. The Seminole Nation hereby grant a right-of-way through their lands to any company which shall be duly authorized by Congress and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point on their eastern to their western or southern boundary; but said railroad company, together with all its agents and employes, shall be subject to the laws of the United States relating to the intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose. And the Semi-

noles agree to sell to the United States or any company duly authorized as aforesaid, such lands not legally owned or occupied by a member or members of the Seminole Nation lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Seminole Nation and the party or parties building said road—subject to the approval of the President of the United States: Provided, however, that said land thus sold shall not be reconveyed, leased or rented to, or be occupied by any one not a citizen of the Seminole Nation, according to its laws, and recognized usages: Provided, also, that officers, servants, and employes of said railroad necessary to its construction and management shall not be excluded from such necessary occupancy, they being subject to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior; nor shall any conveyance of said lands be made to the party building and managing said road until its completion as a first-class railroad and its acceptance as such by the Secretary of the Interior.

Agency Buildings.

Article 6. Inasmuch as there are no agency buildings upon the new Seminole reservation, it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand dollars (\$10,000), suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the Superintendent of Indian Affairs; in consideration whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands upon which said agency buildings shall be directed (erected), which land shall revert to said Nation when no longer used by the United States, upon said Nation paying a fair value for said buildings at the time vacated.

Seminole Agree to Certain Legislation—Proviso—General Council—Census—First Council, How Composed—Time and Place of Meeting—Session Not to Exceed Thirty Days—Special Sessions—Powers of General Council—Who to Preside Over Council—Secretary of Council—Pay—Pay of Members—Courts.

Article 7. The Seminole Nation agrees to such legislation as Congress and the President may deem necessary for the better administration of the rights of person and property within the Indian Territory; Provided, however, (That) said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges and customs.

The Seminole Nation also agree that a General Council, consisting of delegates elected by each nation, a tribe lawfully resident within the Indian Territory, may be annually convened in said territory, which council shall be organized in such manner and possess such powers as are hereinafter described:

1st. After the ratification of this treaty, and as soon as may be deemed practicable by the Secretary of the Interior and prior to the first session of said council, a census or enumeration of each tribe lawfully resident in said Territory shall be taken, under the direction of the Superintendent of Indian Affairs, who, for that purpose, is hereby authorized to designate and appoint competent persons, whose compensation shall be fixed by the Secretary of the Interior and paid by the United States.

2d. The first General Council shall consist of one member from each tribe and an additional member for each one thousand Indians, or each fraction of a thousand greater than five hundred, being members of any tribe lawfully resident in said Territory, and shall be elected by said tribes, respectively, who may assent to the establishment of said General Council; and if none should be thus formally selected by any nation or tribe, the said nation or tribe shall be represented in said General Council by the chiefs and head men of said tribes, to be taken in the order of their rank, in the same number and proportion as above indicated. After the said census shall have been taken and completed, the Superintendent of Indian Affairs shall publish and declare to each tribe the number of members of said council to which they shall be entitled under the provisions of

this article; and the persons so entitled to represent said tribe shall meet at such time and place as he shall appoint; but thereafter the time and place of the sessions of said council shall be determined by its action: Provided, That no session in any one year shall exceed the term of thirty days, and provided that special sessions of said council may be called by said Superintendent whenever, in his judgment or that of the Secretary of the Interior, the interest of said tribes shall require.

3d. Said General Council shall have power to legislate upon all rightful subjects and matters pertaining to the intercourse and relations of the Indian tribes and nations resident in said Territory; the arrest and extradition of criminals and offenders escaping from one tribe to another; the administration of justice between members of the several tribes of said Territory and persons other than Indians and members of said tribes or nations; the construction of works of internal improvement and the common defence and safety of the nation of said Territory. All laws enacted by said council shall take effect at such time as may therein be provided, unless suspended by direction of the Secretary of the Interior or the President of the United States. No law shall be enacted inconsistent with the Constitution of the United States or the laws of Congress, or existing treaty stipulations with the United States; nor shall said council legislate upon matters pertaining to the organization, laws or customs of the several tribes, except as herein provided for.

4th. Said council shall be presided over by the Superintendent of Indian Affairs, or, in case of his absence for any cause, the duties of said Superintendent enumerated in this article shall be performed by such person as the Secretary of the Interior may direct.

5th. The Secretary of the Interior shall appoint a secretary of said council, whose duty it shall be to keep an accurate record of all the proceedings of said council, and who shall transmit a true copy of all such proceedings, duly certified by the Superintendent of Indian Affairs, to the Secretary of the Interior immediately after the session of said council. He shall be paid out of the treasury of the United States an annual salary of five hundred dollars.

6th. The members of said council shall be paid by the United States the sum of four dollars per diem during the time actually in attendance upon the sessions of said council, and at the rate of four dollars for every twenty miles necessarily trav-

eled by them in going to said council and returning to their homes, respectively, to be certified by the secretary of said council and the Superintendent of Indian Affairs.

7th. The Seminoles also agree that a court or courts may be established in said Territory, with such jurisdiction and organized in such manner as Congress may by law provide.

This Treaty to Be a Full Settlement of All Claims—Diversions of Annuities.

Article 8. The stipulations of this treaty are to be a full settlement of all claims of said Seminole Nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose consequent upon the late war with the so-called Confederate States. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole Nation by the United States. And the United States agree that no annuities shall be diverted from the object for which they were originally devoted by treaty stipulations with the Seminoles, to the use of refugee and destitute Indians, other than the Seminoles or members of the Seminole Nation, after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

Treaty Obligations Reaffirmed.

Article 9. The United States reaffirms and reassumes all obligations of treaty stipulations entered into before the treaty of said Seminole Nation with the so-called Confederate States, August first, eighteen hundred and sixty-one, not inconsistent herewith; and further agree to renew all payments of annuities accruing by force of said treaty stipulations, from and after the close of the present fiscal year, June thirtieth, in the year of our Lord one thousand eight hundred and sixty-six, except as is provided in Article eight (viii).

Lands Granted for Missionary or Educational Purposes—Not to Be Sold Except, Etc.—When Sold Proceeds to Be How Applied.

Article 10. A quantity of land not exceeding six hundred and forty acres, to be selected according to legal subdivisions, in one body, and which shall include their improvements, is

hereby granted to every religious society or denomination which has erected, or which, with the consent of the Indians, may hereafter erect, buildings within the Seminole country for missionary or educational purposes; but no land thus granted, nor the buildings which have been or may be erected thereon shall ever be sold or otherwise disposed of except with the consent and approval of the Secretary of the Interior. And whenever any such land or buildings shall be so sold or disposed of, the proceeds thereof shall be applied under the direction of the Secretary of the Interior, to the support and maintenance of other similar establishments for the benefit of the Seminoles and such other persons as may be, or may hereafter become members of the tribe according to its laws, customs and usages.

Inconsistent Treaty Provisions Annulled.

Article 11. It is further agreed that all treaties heretofore entered into between the United States and the Seminole Nation which are inconsistent with any of the articles or provisions of this treaty shall be and are hereby rescinded and annulled.

In Testimony Whereof, The said Dennis N. Cooley, Commissioner of Indian Affairs; Elijah Sells, Superintendent of Indian Affairs, and Col. Ely S. Parker, as aforesaid, and the undersigned, persons representing the Seminole Nation, have hereunto set their hands and seals the day and year first above written.

Dennis N. Cooley,	(Seal)
Commissioner of Indian Affairs.	
Elijah Sells,	(Seal)
Superintendent Indian Affairs.	
Col. Ely S. Parker,	(Seal)
Special Commissioner.	
John Chup-co, his x mark,	(Seal)
King or Head-Chief.	
Cho-cate-harjo, his x mark,	(Seal)
Counsellor.	
Fos-harjo, his x mark,	(Seal)
Chief.	
John F. Brown,	(Seal)
Special Delegate for Southern Seminoles.	

In the presence of:

Robert Johnson, his x mark,

United States Interpreter for Seminole Indians.

Geo. A. Reynolds,

United States Indian agent for Seminoles.

Ok-tus-sus-har-jo, his x mark, or Sands.

Cow-e-to-me-ko, his x mark.

Che-chu-chee, his x mark.

Harry Island, his x mark,

United States Interpreter for Creek Indians.

J. W. Dunn,

United States Indian Agent for the Creek Nation.

Perry Fuller.

Signed by John F. Brown, special delegate for the Southern Seminoles, in presence of, this June thirtieth, eighteen hundred and sixty-six:

W. R. Irwin.

J. M. Tebbetts,

Geo. A. Reynolds,

United States Indian Agent.

Robert Johnson, his x mark,

United States Interpreter.

EXHIBIT Ff.

March 3, 1873.

CHAP. CCCXXII.—To authorize the Secretary of the Interior to negotiate with the Creek Indians for the cession of a portion of their reservation, occupied by friendly Indians.

Preamble.

WHEREAS, By the third article of the treaty concluded with the Creek Indians June fourteenth, eighteen hundred and sixty-six, said Indians ceded to the United States, for the settlement of friendly Indians and freedmen, the west half of their entire domain, to be divided by a line running north and south; and, whereas, the recent survey of said line, made in conformity with the provisions of said treaty, includes within the limits of the Creek reservation, east of said line, some of the improvements made on a reservation selected on what was supposed to be the Creek ceded lands, for the Seminole tribe of Indians,

which reservation is provided for in their treaty of March first, eighteen hundred and sixty-six, and also some of the improvements of the Sacs and Foxes, of the Mississippi tribe of Indians, made on a reservation intended to be established in accordance with the provisions of their treaty of February eighteenth, eighteen hundred and sixty-seven; and, whereas, said improvements have been made upon said lands by and for the aforesaid Indians, who have settled thereupon in good faith, in accordance with treaty stipulations; and, whereas, it is necessary in order to secure these improvements to said Indians, and to insure them suitable reservations, that the lands occupied thereby should be granted to them; therefore,

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED:

Secretary of the Interior May Negotiate With the Creek Indians for the Cession of a Portion of Their Reservation—Report to Congress.

That the Secretary of the Interior be and he hereby is authorized to negotiate with the aforesaid Creek Indians, for the relinquishment to the United States of such portion of their country as may have been set apart in accordance with treaty stipulations, for the use of the Seminoles, and the Sacs and Foxes of the Mississippi tribes of Indians, respectively, found to be east of the line separating the Creek ceded lands from the Creek reservation, and also to negotiate and arrange with said tribes for a final and permanent adjustment of their reservations; and the Secretary shall report the result to Congress.

Approved March 3, 1873.

EXHIBIT Fg.

August 5, 1882.

CHAP. 389.—An act making appropriations for the legislative, executive and judicial expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes.

INDIAN AFFAIRS.

Creek Nation of Indians.

To pay the Creek Nation of Indians for one hundred and seventy-five thousand acres of land now occupied by the Seminole Nation, the sum of one hundred and seventy-five thousand dollars, as per agreement made in pursuance of the Act of March third, eighteen hundred and seventy-three, which agreement bears date February fourteenth, eighteen hundred and eighty-one, and is now on file in the Department of the Interior; said sums to be immediately available.

Approved August 5, 1882.

EXHIBIT G.

March 3, 1895.

27 Stat. 612.

CHAP. 209.—An act making appropriations for current and contingent expenses, and fulfilling treaty stipulations with Indian tribes, for fiscal year ending June thirtieth, eighteen hundred and ninety-four.

Allotments to Cherokee, Creek, Choctaw and Seminole—See Note to 1898, ch. 517, post p. 656; See Note to 1898, ch.

542, post p. 662—*Allottees to Be Deemed Citizens*

—*Survey of Allotted Lands—Rights of United States to Cease.*

Sec. 15. The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby apportioned to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.

*Negotiations With the Five Civilized Tribes in Indian Territory
—Commission to Be Appointed.*

Sec. 16. The President shall nominate and by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation; the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same, or some part thereof, to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a state or states of the Union which shall embrace the lands within said Indian Territory.

Salaries, Etc., of Commissioners—Secretary, Stenographer and Interpreter—27 Stat. 646—Surveyor, Etc.

The commissioners so appointed shall each receive a salary, to be paid during such time as they may be actually employed, under direction of the President, in the duties enjoined by this Act, at the rate of five thousand dollars per annum, and shall also be paid their reasonable and proper expenses incurred in prosecution of the objects of this Act, upon accounts therefor to be rendered to and allowed by the Secretary of the Interior from time to time. That such commissioners shall have power to employ a secretary, a stenographer, and such interpreter or interpreters as may be found necessary to the performance of their duties, and by order to fix their compensation, which shall be paid, upon the approval of the Secretary of the Interior, from time to time, with their reasonable and necessary expenses, upon accounts to be rendered as aforesaid; and may also employ in like manner, and with the like approval, a surveyor or other assistant or agent, which they shall certify in writing to be necessary to the performance of any part of their duties.

Regulations, Etc.—Duties of Commission; as to Allotment of Lands in Severalty to Indians—Cession of Other Lands to United States—Agreements for Interest, Etc.—Power and Objects of the Commission.

Such commissioners shall, under such regulations and directions as shall be prescribed by the President, through the Secretary of the Interior, enter upon negotiations with the several nations, of Indians, as aforesaid, in the Indian Territory, and shall endeavor to procure, first, such allotment of lands in severalty to the Indians belonging to each such nation, tribe or band, respectively, as may be agreed upon as just and proper to provide for each such Indian a sufficient quantity of land for his or her needs, in such equal distribution and apportionment as may be found just and suited to the circumstances; for which purpose, after the terms of such an agreement shall have been arrived at, the said commissioners shall cause the lands of any such nation or tribe or band to be surveyed and the proper allotment to be designated; and, secondly, to procure the cession, for such price and upon such terms as shall be agreed upon, of any lands not found necessary to be so allotted or divided, to the United States; and to make proper agreements for the investment or holding by the United States of such moneys as may be paid or agreed to be paid to such nation or tribes or bands, or to any of the Indians thereof, for the extinguishment of their [interest] therein. But said commissioners shall, however, have power to negotiate any and all such agreements as, in view of all the circumstances affecting the subject, shall be found requisite and suitable to such an arrangement of the rights and interests and affairs of such nations, tribes, bands, or Indians, or any of them, to enable the ultimate creation of a territory of the United States with a view to the admission of the same as a state in the Union.

Reports.

The commissioners shall, at any time, or from time to time, report to the Secretary of the Interior their transactions and the progress of their negotiations, and shall at any time, or from time to time, if separate agreements shall be made by them with any nation, tribe or band, in pursuance of the authority hereby conferred, report the same to the Secretary of the Interior for submission to Congress for its consideration and ratification.

Available.

For the purpose aforesaid there is hereby appropriated out of any money in the treasury of the United States, the sum of fifty thousand dollars, to be immediately available.

Right of Sovereignty of the United States Not Waived, Etc.

Neither the provisions of this section nor the negotiations or agreements which may be had or made thereunder shall be held in any way to waive or impair any right of sovereignty which the Government of the United States has over or respecting said Indian Territory or the people thereof, or any other right of the Government relating to said Territory, its lands, or the people thereof.

Approved March 3, 1893.

EXHIBIT H.

July 1, 1898.

30 Stat. 567.

CHAP. 542.—An act to ratify the agreement between the Dawes Commission and the Seminole Nation of Indians.

Agreement With Seminole Nation of Indians.

Whereas, An agreement was made by Henry L. Dawes, Tams Bixby, Frank C. Armstrong, Archibald S. McKennon, Thomas B. Needles, the Commission of the United States to the Five Civilized Tribes, and Allison L. Aylesworth, secretary, John F. Brown, Okchan Harjo, William Cully, K. N. Kinkehee, Thomas West, Thomas Factor, Seminole Commission, A. J. Brown, secretary, on the part of the Seminole Nation of Indians, on December sixteenth, eighteen hundred and ninety-seven, as follows:

AGREEMENT BETWEEN THE UNITED STATES COMMISSIONERS TO
NEGOTIATE WITH THE FIVE CIVILIZED TRIBES, AND THE
COMMISSIONERS ON THE PART OF THE SEMINOLE NATION.

Commissioners.

This agreement by and between the Government of the United States of the first part, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Tams

Bixby, Frank C. Armstrong, Archibald S. McKennon and Thomas B. Needles, duly appointed and authorized thereunto, and the Government of the Seminole Nation in Indian Territory, of the second part, entered into on behalf of said Government by its Commission duly appointed and authorized thereunto, *viz.*, John F. Brown, Okchan Harjo, William Cully, K. N. Kink-hee, Thomas West and Thomas Factor;

Witnesseth, That in consideration of the mutual undertakings herein contained, it is agreed as follows:

Appraisal—Allotment.

All lands belonging to the Seminole tribe of Indians shall be divided into three classes, designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered; giving to each the right to select his allotment so as to include any improvements thereon owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him, during the existence of the present tribal government, and until the members of said tribe shall have become citizens of the United States. Such allotments shall be made under the direction and supervision of the Commission to the Five Civilized Tribes in connection with a representative appointed by the tribal government; and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him.

Encumbrances Prior to Patent Void.

All contracts for sale, disposition or encumbrance of any part of any allotment made prior to date of patent shall be void.

Leases.

Any allottee may lease his allotment for any period not exceeding six years, the contract therefor to be executed in triplicate upon printed blanks provided by the tribal government, and before the same shall become effective it shall be approved by the principal chief and a copy filed in the office of the clerk of the United States Court at Wewoka.

Lease of Minerals, Etc.

No lease of any coal, mineral, coal oil or natural gas within said Nation shall be valid unless made with the tribal government, by and with the consent of the allottee and approved by the Secretary of the Interior.

Division of Royalties, Minerals on Allotments, Etc.

Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe upon extinguishment of tribal government, may be used for such purpose, so that each of allotment may be made equal in value as aforesaid.

Wewoka Townsite, Control, Etc., of.

The townsite of Wewoka shall be controlled and disposed of according to the provisions of an Act of the General Council of the Seminole Nation, approved April 23d, 1897, relative thereto; and on extinguishment of the tribal government, deeds of conveyance shall issue to owners of lots as herein provided for allottees; and all lots remaining unsold at that time may be sold in such manner as may be prescribed by the Secretary of the Interior.

School Fund.

Five hundred thousand dollars (\$500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country.

Reservations from Allotment—School Lands—Churches.

There shall also be excepted from allotment one-half acre for the use and occupancy of each of twenty-four churches, including those already existing and such others as may hereafter be established in the Seminole country, by and with the consent of the General Council of the Nation; but should any part of same, at any time, cease to be used for church purposes, such part shall at once revert to the Seminole people and be added to the lands set apart for the use of said district schools.

Schools for Children of Non-Citizens.

One acre in each township shall be excepted from allotment and the same may be purchased by the United States upon which to establish schools for the education of children of non-citizens when deemed expedient.

Deeds, Force of, Etc.—Homestead.

When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee a deed conveying to him all the right, title and interest of the said Nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed and the same shall thereupon operate as relinquishment of the right, title and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee, and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and non-taxable as a homestead in perpetuity.

Per Capita Payment of Residue of Funds, Etc.

All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided and reserving said sum of five hundred thousand dollars for school

fund shall be paid per capita to the members of said tribe in three equal installments, the first to be made as soon as convenient after allotment and extinguishment of tribal government, and the others at one and two years, respectively. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements.

Loyal Seminole Claim.

The loyal Seminole claim shall be submitted to the United States Senate, which shall make final determination of same, and, if sustained, shall provide for payment thereof within two years from date hereof.

United States Court at Wewoka.

There shall hereafter be held at the town of Wewoka, the present capital of the Seminole Nation, regular terms of the United States court as at other points in the judicial district of which the Seminole Nation is a part.

Intoxicants.

The United States agrees to maintain strict laws in the Seminole country against the introduction, sale, barter, or giving away of intoxicants of any kind or quality.

Existing Treaties.

This agreement shall in no wise affect the provisions of existing treaties between the Seminole Nation and the United States, except in so far as it is inconsistent therewith.

Jurisdiction of United States Courts—Indian Courts.

The United States courts now existing, or that may hereafter be created, in Indian Territory, shall have exclusive jurisdiction of all controversies growing out of the title, ownership, occupation or use of real estate owned by the Seminoles, and to try all persons charged with homicide, embezzlement, bribery,

and embracery hereafter committed in the Seminole country, without reference to race or citizenship of the persons charged with such crime; and any citizen or officer of said Nation charged with any such crime, if convicted, shall be punished as if he were a citizen or officer of the United States, and the courts of said Nation shall retain all the jurisdiction which they now have, except as herein transferred to the courts of the United States.

Repeal—30 Stat. 72.

When this agreement is ratified by the Seminole Nation and the United States, the same shall serve to repeal all the provisions of the Act of Congress approved June seventh, eighteen hundred and ninety-seven, in any manner affecting the proceedings of the General Council of the Seminole Nation.

Purchase of Land from Creek Indians for Seminoles.

It being known that the Seminole Reservation is insufficient for allotments for the use of the Seminole people, upon which they, as citizens, holding in severalty, may reasonably and adequately maintain their families, the United States will make effort to purchase from the Creek Nation, at one dollar and twenty-five cents per acre, two hundred thousand acres of land, immediately adjoining the eastern boundary of the Seminole Reservation, and lying between the North Fork and South Fork of the Canadian River, in trust for and to be conveyed by proper patent by the United States to the Seminole Indians, upon said sum of one dollar and twenty-five cents per acre being reimbursed to the United States by said Seminole Indians; the same to be allotted as herein provided for lands now owned by the Seminoles.

Ratification.

This agreement shall be binding on the United States when ratified by Congress and on the Seminole people when ratified by the General Council of the Seminole Nation.

Signatures.

In Witness Whereof, The said Commissioners have hereunto affixed their names at Muskogee, Indian Territory, this sixteenth day of December, A. D. 1897.

Henry L. Dawes,
Tams Bixby,
Frank C. Armstrong,
Archibald S. McKennon,
Thomas B. Needles,

Commission to the Five Civilized Tribes.

Allison L. Aylesworth, Secretary.
John F. Brown,
Okchan Harjo,
William Cully,
K. N. Kinkehee,
Thomas West,
Thomas Factor,

Seminole Commission.

A. J. Brown, Secretary.

Therefore, Be It Enacted, By the Senate and House of Representatives of the United States of America in Congress assembled, that the same be and is hereby ratified and confirmed, and all laws and parts of laws inconsistent therewith are hereby repealed.

Approved July 1, 1898.

EXHIBIT I.

June 2, 1900.

31 Stat. 250.

CHAP. 610.—An Act to ratify an agreement between the Commission to the Five Civilized Tribes and the Seminole Tribe of Indians.

Seminole Indians—Agreement With, as to Rolls of Citizens, Etc.
—Preamble.

Whereas, an agreement was made by Henry L. Dawes, Tams Bixby, Archibald S. McKennon, and Thomas B. Needles, the commission of the United States to the Five Civilized

Tribes, and John F. Brown, and K. N. Kinkehee, commissioners on the part of the Seminole tribe of Indians, on the seventh day of October, eighteen hundred and ninety-nine, as follows:

Commissioners.

"This agreement by and between the Government of the United States of the first part, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Tams Bixby, Archibald S. McKennon, and Thomas B. Needles, duly appointed and authorized thereunto, and the Seminole tribe of Indians, in Indian Territory, of the second part, entered into in behalf of said tribe by John F. Brown, and K. N. Kinkehee, commissioners duly appointed and authorized thereunto, witnesseth:

* *Who May Be Enrolled—Ante, p. 92—Rolls to Be Final.*

"First. That the Commission to the Five Civilized Tribes, in making the rolls of Seminole citizens, pursuant to the Act of Congress approved June twenty-eight, eighteen hundred and ninety-eight, shall place on said rolls the names of all children born to Seminole citizens up to and including the thirty-first day of December, eighteen hundred and ninety-nine, and the names of all Seminole citizens then living; and the rolls so made, when approved by the Secretary of the Interior, as provided by said Act of Congress, shall constitute the final rolls of Seminole citizens, upon which the allotment of lands and distribution of money and other property belonging to the Seminole Indians shall be made and to no other persons.

Laws of Descent—Proviso—To Parents, Etc.

"Second. If any member of the Seminole tribe of Indians shall die after the thirty-first day of December, eighteen hundred and ninety-nine, the lands, money and other property to which he would be entitled if living, shall descend to his heirs who are Seminole citizens, according to the laws of descent and distribution of the State of Arkansas and be allotted and distributed to them accordingly: Provided, That in all cases where such property would descend to the parents under said laws the same shall first go to the mother instead of the father, and

then to the brothers and sisters, and their heirs, instead of the father.

"Third. This agreement to be ratified by the general council of the Seminole Nation and by the Congress of the United States.

"In witness whereof, the said commissioners hereunto affix their names, at Muskogee, Indian Territory, this seventh day of October, eighteen hundred and ninety-nine.

Henry L. Dawes,
Tams Bixby,
Archibald S. McKennon,
Thomas B. Needles,

Commission to the Five Civilized Tribes.

John F. Brown,
K. N. Kinkehee,
Seminole Commissioners."

Ratification—Repeal.

Therefore, be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the same be and is hereby ratified and confirmed and all laws and parts of laws inconsistent therewith are hereby repealed.

Approved June 2, 1900.

EXHIBIT J.

March 3, 1902.
(Public No. 144.)

CHAP. 994.—An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes.

*Seminole Nation Tribal Government to Cease March 4, 1906,
Proviso Deeds to Indian Allottees. Vol. 30, p. 568—
Homesteads Alienable After Twenty-one Years
—Non-liability for Debt.*

Sec. 8. That the tribal government of the Seminole Nation shall not continue longer than March fourth, nineteen hundred

and six; Provided, that the Secretary of the Interior shall at the proper time furnish the Principal Chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation contained in the Act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes, page five hundred and sixty-seven) and said Principal Chief shall execute and deliver said deeds to the Indian allottees as required by said Act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee until further legislation by Congress, and such records shall have like effect as other public records: Provided further, that the homestead referred to in said Act shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment. A separate deed shall be issued for said homestead, and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof.

Approved March 3, 1903.

EXHIBIT K.

March 2, 1906. (S. J. R. 37.)

(Pub. Res. No. 7.)

(No. 7.) Joint resolution extending the tribal existence and government of the Five Civilized Tribes of Indians in Indian Territory.

Five Civilized Tribes, Ind. T.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

Approved March 2, 1906.

EXHIBIT L.

(Act of April 26, 1906.)
(Public—No. 129.)

An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That after the approval of this Act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this Act, in which cases such motion shall be made within sixty days after the passage of this Act: *Provided*, That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commissioner to the Five Civilized Tribes show application was made prior to December first, nineteen hundred and five, and which was not allowed solely because not made within the time prescribed by law.

SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the

Creek agreement ratified by Act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and re-enacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this Act as to allotments heretofore made, no contest shall be instituted against such allotment: *Provided*, That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

SEC. 3. That the approved roll of Creek freedmen shall include only those persons whose names appear on the roll prepared by J. W. Dunn, under authority of the United States prior to March fourteenth, eighteen hundred and sixty-seven, and their descendants born since said roll was made, and those lawfully admitted to citizenship in the Creek Nation subsequent to the date of the preparation of said roll, and their descendants born since such admission, except such, if any, as have heretofore been enrolled and their enrollment approved by the Secretary of the Interior.

The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal *bona fide* residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of the Interior.

Lands allotted to freedmen of the Choctaw and Chickasaw tribes shall be considered "homesteads," and shall be subject to

all the provisions of this or any other Act of Congress applicable to homesteads of citizens of the Choctaw and Chickasaw tribes.

SEC. 4. That no name shall be transferred from the approved freedmen, or any other approved rolls of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, to the roll of citizens by blood, unless the records in charge of the Commissioner to the Five Civilized Tribes show that application for enrollment as a citizen by blood was made within the time prescribed by law by or for the party seeking the transfer and said records shall be conclusive evidence as to the fact of such application, unless it be shown by documentary evidence that the Commission to the Five Civilized Tribes actually received such application within the time prescribed by law.

SEC. 5. That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this Act.

SEC. 6. That if the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States, or if any such executive becomes permanently disabled, the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability or death of the incumbent, by appointment of a citizen by blood of the tribe.

If any such executive shall fail, refuse or neglect, for thirty days after notice that any instrument is ready for his signature,

to appear at a place to be designated by the Secretary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded shall convey legal title, and such approval shall be conclusive evidence that such executive or chief refused or neglected after notice to execute such instrument.

Provided, That the principal chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole government shall cease to exist.

SEC. 7. That the Secretary of the Interior shall, by written order, within ninety days from the passage of this Act, segregate and reserve from allotment sections one, two, three, four, five, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, the east half of section sixteen, and the northeast quarter of section six, in township nine south, range twenty-six east, and sections five, six, seven, eight, seventeen, eighteen, and the west half of section sixteen, in township nine south, range twenty-seven east, Choctaw Nation, Indian Territory, except such portions of said lands upon which substantial, permanent, and valuable improvements were erected and placed prior to the passage of this Act and not for speculation, but by members and freedmen of the tribes actually themselves and for themselves for allotment purposes, and where such identical members or freedmen of said tribes now desire to select same as portions of their allotments, and the action of the Secretary of the Interior in making such segregation shall be conclusive. The Secretary of the Interior shall also cause to be estimated and appraised the standing pine timber on all of said land, and the land segregated shall not be allotted, except as hereinbefore provided, to any member or freedman of the Choctaw and Chickasaw tribes. Said segregated land and the pine timber thereon shall be sold and disposed of at public auction, or by sealed bids for cash, under the direction of the Secretary of the Interior.

SEC. 8. That the records of each of the land offices in the Indian Territory, should such office be hereafter discontinued, shall be transferred to and kept in the office of the clerk of the United States court in whose district said records are now located. The officer having custody of any of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and the disposition of the land and other property of said tribes, upon proper ap-

plication and payment of such fees as the Secretary of the Interior may prescribe, may make certified copies of such records, which shall be evidence equally with the originals thereof; but fees shall not be demanded for such authenticated copies as may be required by officers of any branch of the Government nor for such unverified copies as such officer, in his discretion, may deem proper to furnish. Such fees shall be paid to bonded officers or employes of the Government, designated by the Secretary of the Interior, and the same or so much thereof as may be expended under the direction of the Secretary of the Interior for the purposes of this section, and any unexpended balance shall be deposited in the Treasury of the United States, as are other public moneys.

SEC. 9. The disbursements, in the sum of one hundred and eighty-six thousand dollars, to and on account of the loyal Seminole Indians, by James E. Jenkins, special agent appointed by the Secretary of the Interior, and by A. J. Brown as administrator *de bonis non*, under an Act of Congress approved May thirty-first, nineteen hundred, appropriating said sum, be, and the same are hereby, ratified and confirmed: *Provided*, That this shall not prevent any individual from bringing suit in his own behalf to recover any sum really due him.

That the Court of Claims is hereby authorized and directed to hear, consider, and adjudicate the claims against the Mississippi Choctaws of the estate of Charles F. Winton, deceased, his associates and assigns, for services rendered and expenses incurred in the matter of the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation, and to render judgment thereon on the principle of *quantum meruit*, in such amount or amounts as may appear equitable or justly due therefor, which judgment, if any, shall be paid from any funds now or hereafter due such Choctaws by the United States. Notice of such suit shall be served on the governor of the Choctaw Nation, and the Attorney-General shall appear and defend the said suit on behalf of said Choctaws.

SEC. 10. That the Secretary of the Interior is hereby authorized and directed to assume control and direction of the schools in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, with the lands and all school property pertaining thereto, March fifth, nineteen hundred and six, and to conduct such schools under rules and regulations to be prescribed by him, retaining tribal educational officers, subject to dismissal by the Secretary of the Interior, and the present system so far as

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practicable, until such time as a public school system shall have been established under Territorial or State government, and proper provision made thereunder for the education of the Indian children of said tribes, and he is hereby authorized and directed to set aside a sufficient amount of any funds, invested or otherwise, in the Treasury of the United States, belonging to said tribes, including the royalties on coal and asphalt in the Choctaw and Chickasaw nations, to defray all the necessary expenses of said schools, using, however, only such portion of said funds of each tribe as may be requisite for the schools of that tribe, not exceeding in any one year for the respective tribes the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five; and he is further authorized and directed to use the remainder, if any, of the funds appropriated by the Act of Congress approved March third, nineteen hundred and five, "for the maintenance, strengthening, and enlarging of the tribal schools of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole nations," unexpended March fourth, nineteen hundred and six, including such fees as have accrued or may hereafter accrue under the Act of Congress approved February nineteenth, nineteen hundred and three, Statutes at Large, volume thirty-two, page eight hundred and forty-one, which fees are hereby appropriated, in continuing such schools as may have been established, and in establishing such new schools as he may direct, and any of the tribal funds so set aside remaining unexpended when a public school system under a future State or Territorial government has been established, shall be distributed per capita among the citizens of the nations, in the same manner as other funds.

SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision

into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: *Provided*, That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded.

Upon dissolution of the tribal governments, every officer, member, or representative of said tribes, respectively, having in his possession, custody, or control any money or other property of any tribe shall make full and true account and report thereof to the Secretary of the Interior, and shall pay all money of the tribe in his possession, custody, or control, and shall deliver all other tribal property so held by him, to the Secretary of the Interior, and if any person shall willfully and fraudulently fail to account for all such money and property so held by him, or to pay and deliver the same as herein provided for sixty days from dissolution of the tribal government, he shall be deemed guilty of embezzlement and upon conviction thereof shall be punished by a fine of not exceeding five thousand dollars or by imprisonment not exceeding five years, or by both such fine and imprisonment, according to the laws of the United States relating to such offense, and shall be liable in civil proceedings to be prosecuted in behalf of and in the name of the tribe for the amount or value of the money or property so withheld.

SEC. 12. That the Secretary of the Interior is authorized to sell, upon such terms and under such rules and regulations as he may prescribe, all lots in towns in the Choctaw and Chickasaw nations reserved from appraisement and sale for use in connection with the operation of coal and asphalt mining leases or for the occupancy of miners actually engaged in working for lessees operating coal and asphalt mines, the proceeds arising from such sale to be deposited in the Treasury of the United States as are other funds of said tribes.

If the purchaser of any town lot sold under the provisions of law regarding the sale of town sites in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole nations fail for sixty days after approval hereof to pay the purchase price or any install-

ment thereof then due, or shall fail for thirty days to pay the purchase price or any installment thereof falling due hereafter, he shall forfeit all rights under his purchase, together with all money paid thereunder, and the Secretary of the Interior may cause the lots upon which such forfeiture is made to be resold at public auction for cash, under such rules and regulations as he may prescribe. All municipal corporations in the Indian Territory are hereby authorized to vacate streets and alleys, or parts thereof, and said streets and alleys, when vacated, shall revert to and become the property of the abutting property owners.

SEC. 13. That all coal and asphalt lands whether leased or unleased shall be reserved from sale under this Act until the existing leases for coal and asphalt lands shall have expired or until such time as may be otherwise provided by law.

SEC. 14. That the lands in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole nations reserved from allotment or sale under any Act of Congress for the use or benefit of any person, corporation, or organization shall be conveyed to the person, corporation, or organization entitled thereto: *Provided*, That if any tract or parcel thus reserved shall before conveyance thereof be abandoned for the use for which it was reserved by the party in whose interest the reservation was made, such tract or parcel shall revert to the tribe and be disposed of as other surplus lands thereof: *Provided further*, That this section shall not apply to land reserved from allotment because of the right of any railroad or railway company therein in the nature of an easement for right of way, depot, station grounds, water stations, stock yards or other uses connected with the maintenance and operation of such company's railroad, title to which tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the Interior at a valuation to be determined by him; but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title to which, upon abandonment, shall vest in such municipality.

The principal chief of the Choctaw Nation and the governor of the Chickasaw Nation are, with the approval of the Secretary of the Interior, hereby authorized and directed to issue

patents to the Murrow Indian Orphans' Home, a corporation of Atoka, Indian Territory, in all cases where tracts have been allotted under the direction of the Secretary of the Interior for the purpose of allowing the allottees to donate the tract so allotted to said Murrow Indian Orphans' Home.

In all cases where enrolled citizens of either the Choctaw or Chickasaw tribe have taken their homestead and surplus allotment and have remaining over an unallotted right to less than ten dollars on the basis of the allotment value of said lands, such unallotted right may be conveyed by the owners thereof to the Murrow Indian Orphans' Home aforesaid; and whenever said conveyed rights shall amount in the aggregate to as much as ten acres of average allottable land, land to represent the same shall be allotted to the said Murrow Indian Orphans' Home, and certificate and patent shall issue therefor to said Murrow Indian Orphans' Home.

And there is hereby authorized to be conveyed to said Murrow Indian Orphans' Home, in the manner hereinbefore prescribed for the conveyance of land, the following-described lands in the Choctaw and Chickasaw nations, to-wit: Sections eighteen and nineteen in township two north, range twelve east; the south half of the northeast quarter, the northeast quarter of the northeast quarter, the south half of the northwest quarter of the northeast quarter, the south half of the southeast quarter, the northeast quarter of the southeast quarter, the south half of the northwest quarter of the southeast quarter, the northeast quarter of the northwest quarter of the southeast quarter, the northeast quarter of the southeast quarter of the southwest quarter, and the northwest quarter of the northwest quarter of section twenty-four, and the northwest quarter of the southeast quarter, the north half of the southwest quarter of the southeast quarter, the south half of the southwest quarter of the southwest quarter, the northeast quarter of the southwest quarter of the southwest quarter, and the southeast quarter of the northwest quarter of the southwest quarter of section twenty-three, and the southwest quarter of the southwest quarter of the southeast quarter of section twenty-six, and the southeast quarter of the northwest quarter of the northwest quarter, the south half of the northeast quarter of the northwest quarter, the northeast quarter of the northeast quarter of the northwest quarter, and the east half of the southeast quarter of the northwest quarter of section twenty-five, all in township two north, range eleven east, containing one thousand

seven hundred and ninety acres, as shown by the Government survey, for the purpose of the said Home.

SEC. 15. The Secretary of the Interior shall take possession of all buildings now or heretofore used for governmental, school, and other tribal purposes, together with the furniture therein and the land appertaining thereto, and appraise and sell the same at such time and under such rules and regulations as he may prescribe, and deposit the proceeds, less expenses incident to the appraisement and sale, in the Treasury of the United States to the credit of the respective tribes: *Provided*, That in the event said lands are embraced within the geographical limits of a State or Territory of the United States such State or Territory or any county or municipality therein shall be allowed one year from date of establishment of said State or Territory within which to purchase any such lands and improvements within their respective limits at not less than the appraised value. Conveyances of lands disposed of under this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances.

SEC. 16. That when allotments as provided by this and other Acts of Congress have been made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes. In the disposition of the unallotted lands of the Choctaw and Chickasaw nations each Choctaw and Chickasaw freedman shall be entitled to a preference right, under such rules and regulations as the Secretary of the Interior may prescribe, to purchase at the appraised value enough land to equal with that already allotted to him forty acres in area. If any such purchaser fails to make payment within the time prescribed by said rules and regulations, then such tract or parcel of land shall revert to the said Indian tribes and be sold as other surplus lands thereof. The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations, which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. Conveyances of lands sold under

the provisions of this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances: *Provided further*, That agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person.

SEC. 17. That when the unallotted lands and other property belonging to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of Indians have been sold and the moneys arising from such sales or from any other source whatever have been paid into the United States Treasury to the credit of said tribes, respectively, and when all the just charges against the funds of the respective tribes have been deducted therefrom, any remaining funds shall be distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls of the respective tribes, such distribution to be made under rules and regulations to be prescribed by the Secretary of the Interior.

SEC. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: *Provided*, That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him.

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

SEC. 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable

to recording instruments now in force in said Indian Territory.

SEC. 21. That if any allottee of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes die intestate without widow, heir or heirs, or surviving spouse, seized of all or any portion of his allotment prior to the final distribution of the tribal property, and such fact shall be known by the Secretary of the Interior, the lands allotted to him shall revert to the tribe and be disposed of as herein provided for surplus lands; but if the death of such allottee be not known by the Secretary of the Interior before final distribution of the tribal property, the land shall escheat to and vest in such State or Territory as may be formed to include said lands. That heirs of deceased Mississippi Choctaws who died before making proof of removal to and settlement in the Choctaw country and within the period prescribed by law for making such proof may within sixty days from the passage of this Act appear before the Commissioner to the Five Civilized Tribes and make such proof as would be required if made by such deceased Mississippi Choctaws; and the decision of the Commissioner to the Five Civilized Tribes shall be final therein, and no appeal therefrom shall be allowed.

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

SEC. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowl-

edged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner.

SEC. 24. That in the Choctaw, Chickasaw, and Seminole nations public highways or roads two rods in width, being one rod on each side of the section line, may be established on all section lines; and all allottees, purchasers and others shall take title to such land subject to this provision, and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, such damages accruing prior to the inauguration of a State government shall be determined under the direction of the Secretary of the Interior and be paid for from the funds of said tribes, respectively.

All expenses incident to the establishment of public highways or roads in the Creek, Cherokee, Choctaw, Chickasaw, and Seminole nations, including clerical hire, per diem, salary, and expenses of viewers, appraisers and others, shall be paid under the direction of the Secretary of the Interior from the funds of the tribe or nation in which such public highways or roads are established. Any person, firm, or corporation obstructing any public highway or road, and who shall fail, neglect, or refuse for a period of ten days after notice to remove or cause to be removed any and all obstructions from such public highway or road, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding ten dollars per day for each and every day in excess of said ten days which said obstruction is permitted to remain; *Provided, however,* That notice of the establishment of public highways or roads need not be given to allottees or others, except in cases where such public highways or roads are obstructed, and every person obstructing any such public highway or road, as aforesaid, shall also be liable in a civil action for all damages sustained by any person who has in any manner whatever been damaged by reason of such obstruction.

SEC. 25. That any light or power company doing business within the limits of the Indian Territory, in compliance with the laws of the United States that are now or may be in force therein, be, and the same are hereby, invested and empowered with the right of locating, constructing, owning, operating, using, and maintaining canals, reservoirs, auxiliary steam works, and a dam or dams across any non-navigable stream within the limits of said Indian Territory, for the purpose of

obtaining a sufficient supply of water to manufacture and generate water, electric, or other power, light, and heat and to utilize and transmit and distribute such power, light, and heat to other places for its own use or other individuals or corporations, and the right of locating, constructing, owning, operating, equipping, using, and maintaining the necessary pole lines and conduits for the purpose of transmitting and distributing such power, light, and heat to other places within the limits of said Indian Territory.

That the right to locate, construct, own, operate, use, and maintain such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through the Indian Territory, together with the right to acquire, by condemnation, purchase or agreement between the parties, such land as it may deem necessary for the locating, constructing, owning, operating, using, and maintaining of such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through any land held by any Indian tribe or nation, person, individual, corporation, or municipality in said Indian Territory, or in or through any lands in said Indian Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any company complying with the provisions of this Act: *Provided*, That the purchase from and agreements with individual Indians, where the right of alienation has not theretofore been granted by law, shall be subject to approval by the Secretary of the Interior.

In case of the failure of any light or power company to make amicable settlement with any individual owner, occupant, allottee, tribe, nation, corporation, or municipality for any lands or improvements sought to be condemned or appropriated under this Act all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, nation, corporation, or municipality by reason of the appropriation and condemnation of said lands and improvements shall be determined as provided in sections fifteen and seventeen of an Act of Congress entitled "An Act to grant a right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Public Numbered Twenty-six), and all such proceedings hereunder shall conform to said sections, except that

sections three and four of said Act shall have no application, and except that hereafter the plats required to be filed by said Act shall be filed with the Secretary of the Interior and with the Commissioner to the Five Civilized Tribes, and where the words "Principal Chief or Governor" of any tribe or nation occur in said Act, for the purpose of this Act there is inserted the words Commissioner to the Five Civilized Tribes. Whenever any such dam or dams, canals, reservoirs and auxiliary steam works, pole lines and conduits are to be constructed within the limits of any incorporated city or town in the Indian Territory, the municipal authorities of such city or town shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such cities and towns: *Provided*, That all rights granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situated.

SEC. 26. That in addition to the powers now conferred by law, all municipalities in the Indian Territory having a population of over two thousand, to be determined by the last census taken under any provision of law or ordinance of the council of such municipality, are hereby authorized and empowered to order improvements of the streets or alleys or such parts thereof as may be included in an ordinance or order of the common council with the consent of a majority of the property owners whose property as herein provided is liable to assessment therefor for the proposed improvement; and said council is empowered and authorized to make assessments and levy taxes with the consent of a majority of the property owners whose property is assessed, for the purpose of grading, paving, macadamizing, curbing, or guttering streets and alleys, or building sidewalks upon and along any street, roadway or alley within the limits of such municipality, and the cost of such grading, paving, macadamizing, curbing, guttering or sidewalk constructed, or other improvements under authority of this section, shall be so assessed against the abutting property as to require each parcel of land to bear the cost of such grading, paving, macadamizing, curbing, guttering or sidewalk, as far as it abuts thereon, and in the case of streets or alleys to the center thereof; and the cost of street intersections or crossings may be borne by the city or apportioned to the quarter blocks abutting thereon upon the same basis. The special assessments provided for by this section and the amount

to be charged against each lot or parcel of land shall be fixed by the city council or under its authority and shall become a lien on such abutting property, which may be enforced as other taxes are enforced under the laws in force in the Indian Territory. The total amount charged against any tract or parcel of land shall not exceed twenty per centum of its assessed value, and there shall not be required to be paid thereon exceeding one per centum per annum on the assessed value and interest at six per centum on the deferred payments.

For the purpose of paying for such improvements the city council of such municipality is hereby authorized to issue improvement script or certificates for the amount due for such improvements, said script or certificates to be payable in annual installments and to bear interest from date at the rate of six per centum per annum, but no improvement script shall be issued or sold for less than its par value. All of said municipalities are hereby authorized to pass all ordinances necessary to carry into effect the above provisions and for the purpose of doing so may divide such municipality into improvement districts.

That the tangible property of railroad corporations (exclusive of rolling stock) located within the corporate limits of incorporated cities and towns in the Indian Territory shall be assessed and taxed in proportion to its value the same as other property is assessed and taxed in such incorporated cities and towns; and all such city or town councils are hereby empowered to pass such ordinances as may be necessary for the assessment, equalization, levy and collection, annually, of a tax on all property except as herein stated within the corporate limits and for carrying the same into effect: *Provided*, That should any person or corporation feel aggrieved by any assessment of property in the Indian Territory, an appeal from such assessment may be taken within sixty days by original petition to be filed in United States court in the district in which such city or town is located, and the question of the amount and legality of such assessment, and the validity of the ordinance under which such assessment is made may be determined by such court and the costs of such proceeding shall be taxed and apportioned between the parties as the court shall find to be just and equitable.

SEC. 27. That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the

United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided*, That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other Act of Congress.

SEC. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

SEC. 29. That all Acts and parts of Acts inconsistent with the provisions of this Act be, and the same are hereby, repealed.
Approved April 26, 1906.

EXHIBIT M.

(Public—No. 140.)
(H. R. 15641.)

An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried

whites, as freedmen, and as mixed-blood Indians having less than half Indian blood, including minors, shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes Sections thirteen to twenty-three, inclusive, of an Act entitled "An Act to grant the right-of-way through Oklahoma Territory and the Indian Territory to the Enid & Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided*

further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen year.

SEC. 3. That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

That no oil, gas, or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior as if this Act had not been passed: *Provided*, That the owner or owners of any allotted land from which restrictions are removed by this Act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas, or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing canceling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, and the same shall be recorded in the county where the land is situate.

SEC. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.

SEC. 5. That any attempted alienation or incumbrance

by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void.

SEC. 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that state or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

And said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands

of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other incumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

Supplemental to the funds appropriated and available for expenses connected with the affairs of the Five Civilized Tribes, there is hereby appropriated, for the salaries and expenses arising under this section, out of any funds in the Treasury not otherwise appropriated, the sum of ninety thousand dollars, to be available immediately, and until July first, nineteen hundred and nine, for expenditure under the direction of the Secretary of the Interior: *Provided*, That no restricted lands of living minors shall be sold or incumbered, except by leases authorized by law, by order of the court or otherwise.

And there is hereby further appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available and available until expended as the Attorney General may direct, the sum of fifty thousand dollars, to be used in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the Eastern Judicial District of Oklahoma: *Provided*, That the sum of ten thousand dollars of the above amount, or so much thereof as may be necessary, may be expended in the prosecution of cases in the Western Judicial District of Oklahoma.

Any suit brought by the authority of the Secretary of the Interior against the vendee or mortgagee of a town lot, against whom the Secretary of the Interior may find upon investigation no fraud has been established, may be dismissed and the title quieted upon payment of the full balance due on the original appraisement of such lot. *Provided*, That such investigation must be concluded within six months after the passage of this Act.

Nothing in this Act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this Act.

SEC. 7. That no contest shall be instituted after sixty days from the date of the selection of any allotment hereafter made, nor after ninety days from the approval of this Act in case of selections made prior thereto by or for any allottee of the Five Civilized Tribes, and, as early thereafter as practicable, deed or patent shall issue therefor.

SEC. 8. That Section twenty-three of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section the words "or a judge of a county court of the State of Oklahoma."

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in Section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the

issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of Section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this Act, are hereby made applicable to all wills executed under this section.

SEC. 10. That the Secretary of the Interior is hereby authorized and directed to pay out of any moneys in the Treasury of the United States, belonging to the Choctaw or Chickasaw nations respectively, any and all outstanding general and school warrants duly signed by the auditor of public accounts of the Choctaw and Chickasaw nations, and drawn on the national treasurers thereof prior to January first, nineteen hundred and seven, with six per cent interest per annum from the respective dates of said warrants: *Provided*, That said warrants be presented to the United States Indian agent at the Union Agency, Muskogee, Oklahoma, within sixty days from the passage of this Act, together with the affidavits of the respective holders of said warrants that they purchased the same in good faith for a valuable consideration, and had no reason to suspect fraud in the issuance of said warrants: *Provided further*, That such warrants remaining in the hands of the original payee shall be paid by said Secretary when it is shown that the services for which said warrants were issued were actually performed by said payee.

SEC. 11. That all royalties arising on and after July first, nineteen hundred and eight, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided*, That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, nineteen hundred and eight.

SEC. 12. That all records pertaining to the allotment of lands of the Five Civilized Tribes shall be finally deposited in the office of the United States Indian agent, Union Agency, when and as the Secretary of the Interior shall determine such action shall be taken, and there is hereby appropriated, out

of any money in the Treasury not otherwise appropriated, to be immediately available as the Secretary of the Interior may direct, the sum of fifteen thousand dollars, or so much thereof as may be necessary to enable the Secretary of the Interior to furnish the various counties of the State of Oklahoma certified copies of such portions of said records as affect titles to lands in the respective counties.

SEC. 13. That the second paragraph of Section eleven of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended to read as follows:

That every officer, member or representative of the Five Civilized Tribes, respectively, or any other person, having in his possession, custody or control, any money or other property, including the books, documents, records or any other papers, of any of said tribes, shall make full and true account and report thereof to the Secretary of the Interior, and shall pay all money of the tribe in his possession, custody or control, and shall deliver all other tribal properties so held by him to the Secretary of the Interior, and if any person shall willfully and fraudulently fail to account for all such money and property so held by him, or to pay and deliver the same as herein provided, prior to July thirty-first, nineteen hundred and eight, he shall be deemed guilty of embezzlement, and upon conviction thereof shall be punished by fine of not exceeding five thousand dollars, or by imprisonment not exceeding five years, or by both such fine and imprisonment, according to the laws of the United States relating to such offense, and shall be liable in civil proceedings to be prosecuted in behalf of and in the name of the tribe or tribes in interest for the amount or value of the money or property so withheld.

SEC. 14. That the provisions of section thirteen of the Act of Congress approved April twenty-sixth, nineteen hundred and six (Thirty-fourth Statutes at Large, page one hundred and thirty-seven), shall not apply to town lots in town sites heretofore established, surveyed, platted, and appraised under the direction of the Secretary of the Interior, but nothing herein contained shall be construed to authorize the conveyance of any interest in the coal or asphalt underlying said lots.

Approved May 27, 1908.

EXHIBIT N.

In the Circuit Court of the United States for the Eastern
District of Oklahoma.

United States of America, Complainant,

vs.

Equity No. 1112.

Charles S. Crouch, County Treasurer of Seminole Co., *et al.*,
Defendants.

Campbell, D. J.:

The United States, as complainant, seeks to enjoin the sale of certain lands now held by allottees of the Seminole Nation by the state authorities for delinquent taxes for the year 1908. The Government contends that the lands involved are not subject to taxation by the state, or any of its subdivisions. To the bill the defendant has filed a demurrer, challenging the capacity of the complainant to sue and the jurisdiction of the court, setting up that there is no equity in the bill, and a defect of the parties. The first two grounds may be considered together, for if the complainant has capacity to sue, then the United States, being a party plaintiff, the court has jurisdiction. (25 Stat. 434; *United States v. Sayward*, 160 U. S. 493.)

If, as complainant contends, the title to the lands, or any portion of them, is still in the United States, and as to such lands it has not consented to their taxation by the state, it can maintain the suits. By the laws of Oklahoma a land owner may enjoin the illegal levy of any tax, charge, or assessment, or any proceeding to enforce the same (Sec. 5571, Snyder's Comp. Laws), and such injunction may be granted by the Federal Court as well as the state court. (*Cummings v. National Bank*, 101 U. S. 153. But, regardless of whether the United States still retains any title to the lands sought to be taxed, if from congressional legislation or treaty stipulations it appears to be the policy of the Government in relation to the allotment of these lands to the individual members of the tribes that they should not be taxed by the state, and that Congress has so provided, then, as held by the Circuit Court of Appeals, in *United States v. Allen*, 179 Fed. 13, the Government may maintain this suit. *United States v. Rickert*, 188 U. S. 432, was a suit by the Government for the purpose of restraining the collection of taxes alleged to be due the County of Roberts, South Dakota, in respect to certain permanent improvements on and personal property used in the cultivation of lands in that county, occupied by Sioux Indians, to whom allotments had been made

under the general allotment act of 1887, trust patents having been issued, the legal title having been retained by the Government for the period of twenty-five years. The Supreme Court sustained the right of the Government to sue, and held injunction the proper remedy. In the case of the *United States v. Allen*, *supra*, the Circuit Court of Appeals, referring to the Rickert case, says:

"Under the general allotment act of 1887, a provisional patent was issued to the allottees, and the naked legal title retained in the Government for the period of twenty-five years. In the case of the Five Civilized Tribes, this plan was modified to the extent of granting the legal title to the Indian, but imposing upon it a restraint against alienation. These plans present simply differences of method. The object sought in each case was the same; namely, to clothe the Indian with such title to the property as seemed best calculated to encourage his industrial development, and yet accompany this grant with such a restriction as would prevent the main reliance of the Government for the industrial betterment of the Indian from being defeated by the alienation of the property. The right of the Government to invoke the aid of its courts to prevent the defeat of its object is the same under one statute as the other. Its right to maintain a suit to prevent the defeat of its allotment scheme under the general law of 1887 is fully sustained in *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 332. It is contended, however, in the present case, that that decision is not controlling, because there the Government held the legal title to the property for a period of twenty-five years in trust for the Indian, but subject to a restraint upon alienation, whereas here the legal title has been conveyed to the Indian. The decision in the Rickert case does not rest upon a principle of the law of real property, but upon the power of the Nation to enforce its own measures. At page 444 of 188 U. S., at page 478 of 23 Sup. Ct. (47 L. Ed. 532), the right of the Government to maintain the suit is declared to rest, not upon the fact that it held the title to the property, but, to use the language of the court, upon 'the injurious effect of the assessment and taxation complained of upon the plans of the Government with reference to the Indians.' In either case

it is not a right of property which is enforced, but a plan of government. The Supreme Court there declares the right of the Nation to maintain a suit for the enforcement of its policy in regard to Indian allotments to be too plain for argument. 188 U. S. 144, 23 Sup. Ct. 478, 47 L. Ed. 532. This statement is approved in *McKay v. Kalyton*, 204 U. S. 458, 467, 27 Sup. Ct. 346, 51 L. Ed. 566."

The State Constitution, Section 270, provides that "such property as may be exempt by reason of treaty stipulations existing between the Indians and the United States Government, or by Federal laws, during the force and effect of such treaties or Federal laws, shall be exempt from taxation." Congress, by the Act of April 26, 1906 (34 Stat. 137), provided:

"That all lands upon which restrictions are removed shall be subject to taxation and the other lands shall be exempt from, as long as the title remains in the original allottee."

The last mentioned Act, as its title indicated, is to provide for the final disposition of the affairs of the Five Civilized Tribes, and the lands referred to in the provisions above quoted are the lands allotted to members of the Five Civilized Tribes, subject to the tax here involved. By Act of May 27, 1908 (— Stat. —), it was further provided:

"That all lands from which restrictions have been removed, or shall be removed, shall be subject to taxation and all other civil burdens, as though it were the property of other persons than allottees of the Five Civilized Tribes."

From this it is clear that regardless of prior legislation or treaties, the intention and policy of Congress, as expressed by this legislation, was and is that so long as these allotted lands remain subject to any restriction upon alienation, they shall not be taxed by the state, but that whenever all restrictions upon alienation shall be removed, then such lands shall be subject to taxation and other civil burdens to which other lands are subjected. Therefore any attempt on the part of the state

to tax restricted lands would be in violation not only of the Acts of Congress enacted pursuant to its paramount and sole right to legislate regarding these lands, but would also violate the exemption expressed in the state constitution. What was the status of these Seminole lands as to restrictions upon alienation on March 1, 1908, the date taxes for that year were to be assessed? A review of the history of the title to the lands held by the Seminoles in 1897, when the first agreement looking to allotment was made, between them and the Dawes Commission, develops the fact that their national domain comprised two tracts, the westward of which contained two hundred thousand acres, acquired under the Treaty of March 21, 1886, between the United States and the Seminole Nation (14 Stat. 755, 2 Kap. 910), and the eastward of which contained one hundred and seventy-five thousand acres, held pursuant to Act of March 3, 1873 (17 Stat. 626), and Act of August 5, 1882. (22 Stat. 265.) As to the latter tract, it does not appear that any patent or other muniment of title was ever executed or issued by the United States to the Seminole Tribe of Indians. It is clear, however, that it was treated by the Government as a part of their national domain, the same as the westward tract, and was contemplated in the Agreement of 1897 as a part of the tribal domain, to be allotted in severalty to the individuals of the tribe. Through mistake of the Government surveyor who first established the boundary line between the Creek and Seminole domain, the line was run considerably east of its true location. The Seminoles, relying on such line, settled mostly along the east side of the lands set apart to them, assuming that the line was correct. After making valuable improvements, it was developed by a subsequent survey that the true line was really farther west, thus throwing a considerable portion of the Seminole improvements upon Creek lands. After considerable parley with the Creeks, the Government finally purchased from them the one hundred and seventy-five thousand acre tract, upon which the Seminoles had settled thinking it a part of their domain, and they were permitted to continued to occupy it, the same as the westward tract for which they had a patent. But, in any event, the tribal title, even where evidenced by a patent or grant, is but the right of occupancy during tribal existence. In 6th Encyclopaedia, U. S. Sup. Court Reports, page 920, this general rule is deduced from a consideration of the various decisions of the Supreme Court:

"Undoubtedly the right of the Indian Nations or tribes to their lands within the United States at present is a right of possession or occupancy only, the ultimate title in fee in those lands being in the United States. The Indian title, as against the United States, is merely a title and right to the perpetual occupancy of the land, with the privilege of using it in such mode as they see fit until such right of occupation has been surrendered to the Government. But the right of the Indians to their occupancy is as sacred as that of the United States to the fee."

As said in *Cherokee Nation v. Hitchcock*, 187 U. S., at page 307:

"Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all. * * * The manner in which this land is held is described in *Cherokee Nation v. Journeyake*, 155 U. S. 196, where this court, referring to the treaties and patent mentioned in the bill of complaint herein said: 'Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees or any of them.'"

But when the old policy of maintaining and perpetuating them as tribes and as a separate people, regulating their own internal and social relations, independent of the laws of the Union or the state in whose limits they resided, gave place to the new policy of abolishing tribal relations and the assimilation of the individuals of the tribes into the body politic of the state and nation, the tribal title or right of occupancy had served its purpose. In the case of the Five Civilized Tribes, by consent of the United States the tribes were empowered to convey to their respective individual members the tribal title to the lands allotted to them and the ultimate fee reposing in the Government is, by provision of law, also to be conveyed by the approval of the tribal deed by the Secretary of the Interior. So, under existing law, when the patent to the Seminole allottee shall be executed by the principal chief and ap-

proved by the Secretary of the Interior and recorded as provided by law, he will have absolute title in fee simple to his allotment, regardless of the status of the title under which, before allotment, the tribe occupied it.

It is unnecessary here to review in detail the Act of 1893, inaugurating the policy of individual allotment among the members of the Five Civilized Tribes, and providing for a commission representing the Government to confer with the various tribes and effect agreements carrying out this policy of allotment, and the successive acts, under authority of which, in 1897, such agreement was perfected with the Seminoles and ratified by Congress July 1, 1898. (30 Stat. 567.) This agreement provided:

"That all lands belonging to the Seminole Tribe of Indians * * * shall be divided among the members of the tribe, so that each shall have an equal share thereof in value. * * * And each allottee shall have the sole right of occupancy of the land so allotted to him during the existence of the present tribal government, and until the members of said tribe shall become citizens of the United States."

The chairman of the Commission was required to execute and deliver to each allottee a certificate describing therein the land allotted to him. Then follows the first reference to restrictions:

"All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void."

The allottee was permitted to lease his allotment for a term not exceeding six years, with the approval of the Principal Chief, except for mineral purposes, with regard to which it was provided:

"No lease of any coal, mineral, coal oil or natural gas within said nation shall be valid, unless made with the tribal government by and with the consent of the allottee and approved by the Secretary of the Interior. Should there be discovered, on any allotment, any coal, mineral, coal oil, or natural gas, and the same should be

operated so as to produce royalty, one-half of such royalty shall be paid to such allottee, and the remaining half into the tribal treasury, until extinguishment of tribal government."

Then, as to the issuance of deed or patent, it was provided:

"When the tribal government shall cease to exist, the Principal Chief last elected by said tribe shall execute, under his hand and the seal of the nation, and deliver to each allottee a deed conveying to him all the right, title and interest of the said nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as a relinquishment of the right, title and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and non-taxable as a homestead in perpetuity."

By the Appropriation Act of March 3, 1903 (32 Stat. 982), it was provided:

"Sec. 8. That the tribal government of the Seminole Nation shall not continue longer than March fourth, nineteen hundred and six: Provided, That the Secretary of the Interior shall at the proper time furnish the Principal Chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation contained in the Act of July 1st, 1898 (30 Stat., page 567), and said principal chief shall execute and deliver said deeds to the Indian allottees as required by said Act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the

allottee until further legislation by Congress, and such records shall have like effect as other public records: *Provided further*, that the homestead referred to in said Act shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment. A separate deed shall be issued for said homestead, and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof."

This Act fixed a definite time when the tribal government should cease to exist, thereby fixing a definite time when the deeds or conveyances should issue, as provided in the agreement. Reference is made to that agreement and the Secretary of the Interior is directed to furnish blank deeds at the "proper time"; that is, at or about March 4, 1906. The deeds are first to be recorded in the office of the Dawes Commission, for record purposes, when duly executed and approved. The *approval* referred to is that of the Secretary of the Interior, pursuant to the direction contained in the agreement. It is clear that when this Act was passed, Congress intended that, with the abolishment of the tribal government in March, 1906, the legal title should vest in the allottee by the immediate issuance of deeds, as provided in the agreement, and contemplated that the only restrictions upon alienation which should thereafter exist was that upon the homestead for the remainder of the twenty-one year period. But by joint resolution of March 2, 1906, and subsequent legislation the tribal governments are now indefinitely extended.

In the Indian Appropriation Act, approved April 21, 1904 (32 Stat. 189), the following appears:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians, who are not of Indian blood, except minors, are, except as to homesteads, hereby removed."

It is contended that this Act did not apply to the Seminoles, for the reason that the agreement provides that "each allottee shall have the sole right of occupancy of the lands allotted to him during the existence of the present tribal governments, and until the members of said tribe shall become

citizens of the United States"; that this provision shows that only the bare right of occupancy was intended to be conveyed. I do not so construe the agreement. It provided for a division among the members of the tribe of all the lands belonging to the tribe. That is, the lands comprising their domain as they recognized it by Congress.

As in the other nations, the actual, physical division of the land and the allotment of each individual portion to the respective allottees in the Seminole Nation preceded the issuance of deed or patent conveying legal title. In the case of the Seminoles, the formal execution and delivery of deed was not at first contemplated until tribal dissolution should take place, but the actual physical possession of the land, just as in other nations, was given the allottee. The right of its occupancy, to the exclusion of the nation and all other individuals of the tribe (except in the case of a successful contest by another member of the tribe), vested in the allottee immediately upon the selection of his allotment and the issuance by the Commission of the certificate provided for. But in addition to the sole right of occupancy, there was also vested in the allottee the right to a deed, passing the legal title to the land, when the tribal existence should cease. Did this constitute such an interest in the land as might have been alienated, but for the restrictions imposed? Congress, in the same Act, it will be remembered, had provided that all contracts for sale, disposition, or encumbrance of any allotment, made prior to the date of patent, should be void. Would Congress have so legislated if the allottee did not take such an interest in the allotment as might otherwise have been conveyed? By the agreement with the Seminoles of October 7, 1899 (31 Stat. 250), it was provided that if any member of the Seminole Tribe of Indians shall die after the 31st day of December, 1899, the land, money and other property to which he would be entitled, if living, shall descend to his heirs who are Seminole citizens, according to the laws of descent and distribution of the State of Arkansas, and be allotted and distributed to them accordingly. Here Congress recognized in the member of the tribe dying after the date named, a right in lands which might descend to his heirs. By the Indian Appropriation Act of April 21, 1904, *supra*, Congress provided for the removal of restrictions from lands, other than homesteads, of those allottees not of Indian blood. This Act in terms applies to the lands of *all* allottees of *either* of the Five Civilized

Tribes of the class named. Here Congress was freeing the lands of those not of Indian blood from restrictions. Can it be said, in the face of the explicit language used, that Congress did not intend to include the Seminole Nation? If it did intend to include it, then it recognized an alienable estate in the allotments of citizens of the Seminole Tribe not of Indian blood. The Act approved April 26, 1906 (— Stat. —), as its title shows, is to provide for the final disposition of the affairs of the Five Civilized Tribes. Repeatedly, in its various sections, in naming the tribes, the Seminole Tribe is included. In this Act it is provided "That conveyances heretofore made by member of *any* of the Five Civilized Tribes, subsequent to the selection of allotment and subsequent to the removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to the issuance and recording of patent or deed." If the allottees of the Seminole Nation had no conveyable interest, why include them in this legislation? By Section 22 of this Act, the adult heirs of any deceased Indian of *either* of the Five Civilized Tribes, whose selection has been made or to whom a deed or patent has been issued for his, or her, share of the land of the tribe to which he, or she, belongs or belonged, may sell and convey the lands inherited from such decedent. Minor heirs may join in the sale by guardian, and full blood heirs may sell with the approval of the Secretary of the Interior. Here, again, the language clearly includes the Seminole Nation. Was this inadvertence? If not, then Congress recognized in the Seminole allottee an inheritable interest in the land held by him which might be the subject of sale in the hands of his heirs. By the Act of Congress approved May 27, 1908 (— Stat. —), Congress provided for the removal of restrictions from part of the lands of the allottees of the Five Civilized Tribes. After the enacting clause, the first sentence of the Act begins, "That from and after sixty days from the date of this Act, the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or encumbrance, be as follows." Then follow various provisions imposing, extending and removing restrictions upon the various classes of lands involved. Here again the Seminole Nation is included and the interest of the Seminole allottees recognized as capable of conveyance. Section 4 of this Act provides that all lands from which restrictions have been or shall be removed shall be sub-

ject to taxation, etc. No exception is here made of the Seminole Nation. Section 9 provided "That the death of *any allottee* of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's lands." Here, again, the language used includes the Seminoles, and treats the interest of the allottee as something which may be alienated. Section 11 reads:

"That all royalties arising on and after July 1, 1908, from mineral leases of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian Agent, Union Agency, for the benefit of the Indian lessor, or his proper representative, to whom such royalties shall thereafter belong, and no such lease shall be made after said date, except with the allottee or owner of the land: *Provided*, that the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June 30, 1908."

Here the interest in one-half the royalties reserved to the Nation by the original agreement is terminated. It is provided that no lease shall be made except with the allottee or *owner* of the land. Here is a section dealing directly with the Seminole Nation. In it Congress speaks of the land of the allottee or "owner" of the land. This certainly imports a greater interest than the mere right of occupancy for which complainant contends. The leases referred to are those still subject to the supervision of the Secretary of the Interior, and the lessor is referred to as the Indian lessor. It has reference to lands which are still under restrictions, for if the restrictions were removed there would be no supervision of the lease by the Secretary of the Interior.

In view of these successive Acts of Congress, treating the interest of the Seminole allottee prior to patent in the lands allotted to him as not different from that of the allottee of the other tribes or nations, I am clearly of the opinion that it was intended by Congress that the interest of the Seminole allottee in the lands allotted to him prior to the issuance of patent and prior to the removal of restrictions should be the same as that of any other allottee of the Five Civilized Tribes under those conditions. The certificate of allotment evidenced the adjudication of the Commission that the allottee receiving it was

a member of the tribe and entitled to the land described in it. *Wallace v. Adams*, 143 Fed. 716. As said by the Supreme Court, in *Garfield v. Goldsby*, 211 U. S., at page 263, respecting the allottee in that case:

"The relator thereby acquired valuable rights; his name was upon the rolls. The certificate of his allotment was awarded to him. There is nothing in the statutes, as we read them, which gave the Secretary power and authority, without notice and hearing, to strike down the rights thus acquired."

As in other nations, when the Seminole allottee had made his selection and received a certificate of allotment therefor, and had taken possession of the allotment under the provisions of law which excluded the tribe and all other individuals of the tribe from that allotment, and the contest period had passed, he had done everything which the law required of him in order to entitle him to a patent conveying the legal title to the allotment, when such patents should eventually issue. He thereby acquired such an interest in the allotment as might have been the subject of alienation, but for the restrictions imposed. *Doe v. Wilson*, 23 How. 461; *Jones v. Meehan*, 175 U. S. 1.

The Act of April 21, 1904, applied in terms to either of the Five Civilized Tribes. This included the Seminoles. The purpose of the Act was to release the lands of a specified class of allottees from restrictions, so that they might be sold at the will of the owner, Congress having seen fit to place this particular class of allottees entirely upon their own responsibility in handling and disposing of their lands, other than homesteads. I see no reason why the adult Seminole allottee not of Indian blood, after the passage of this Act, was not as free to alienate his interest in his surplus allotment as the adult allottee of the same class in any other of the Five Civilized Tribes. If that be true, then, for reasons stated in an opinion recently filed, in cause No. 1202, *United States v. Schock*, involving a similar question in relation to taxes in the Creek Nation, the lands other than homestead of adult Seminole allottees not of Indian blood, were taxable, on March 1, 1908.

By Section 22 of the Act of Congress of April 26, 1906, *supra*, it was provided:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent had been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent, and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are fullblood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

This is general legislation, common to all of the Five Civilized Tribes, and for the reasons heretofore stated when considering the act of April 21, 1904, it must be held to apply to Seminole allottees. It follows that, as held in the opinion recently filed in equity, No. 1202, *United States v. Schock, County Treasurer*, relating to the Creeks, the land of any Seminole allottee dying prior to March 1, 1908, whose selection had been made, against whom there was no contest and to whom certificate of allotment had issued prior to his death, was taxable by the state, and its subdivisions, on that date, except as to such portion of said lands or interest therein as was then owned by a fullblood heir or heirs. The other allotted lands of the Seminoles, aside from those not of Indian blood, and deceased allottees, above referred to, being still subject to restriction upon alienation on March 1, 1908, were, therefore, non-taxable, except as to any particular tracts from which restrictions may have been specially removed.

The demurrer being a general demurrer, is, therefore, overruled. It is so ordered.

(Signed) RALPH E. CAMPBELL.

(Filed Jan. 12, 1911.)

Judge.

EXHIBIT O.

Opinion in Godfrey v. Iowa Land & Trust Co.

(SUPREME COURT OF OKLAHOMA. MAY 20, 1908.)

INDIANS—CONVEYANCE OF ALLOTMENT—VALIDITY.

"A citizen of the Seminole Nation, not of Indian blood, after selecting his allotment and receiving his certificate of allotment from the chairman of the Commission to the Five Civilized Tribes, as provided for by the agreement of the 16th day of December, A. D. 1897, on the part of the Seminole Tribe of Indians, with the United States, ratified by an Act of Congress of the 1st day of July, A. D. 1898 (30 Stat. 567, c. 542), after the removal of restrictions on the alienation of allotted land by the members of said tribe, by Act of Congress, April 21, 1904 (33 Stat. 204, c. 1402), when no patent has been issued or delivered to such allottee or citizen, may execute a deed or conveyance to that part of his or her allotment not designated by him or her as his or her homestead."

(Syllabus by the court.)

Error from the United States Court for the Western District of the Indian Territory, at Muskogee; Wm. R. Lawrence, Judge.

Action by T. T. Godfrey against the Iowa Land & Trust Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

On the 10th day of April, A. D. 1906, the plaintiff in error, as plaintiff in the court below, filed his first amended complaint against the defendant in error, the defendant in said court, seeking to have a certain deed declared a mortgage. Reference herein will be made to the parties as they appeared in the court below. Plaintiff, as a resident of the State of Kansas, alleged that the defendant was a corporation, organized under the laws in force in the Indian Territory, with its principal place of business at Muskogee, and for cause of action stated that, on April 29, 1905, he bought from one Robert James a certain described tract of land, situated in the Seminole Nation, Rebecca James, the wife of said grantor, joining with him in said deed, in executing and delivering a deed with covenants of general warranty conveying to plaintiff

said land, which said deed was filed for record in the proper recording district wherein the land was situated, to-wit, at Wewoka. A copy of said deed is attached to said complaint, and is in proper form, and contains full and complete covenants of warranty in fee simple. Said Robert James was an enrolled citizen of the Seminole Nation, not of Indian blood, and as such allottee received from the chairman of the Commission to the Five Civilized Tribes certificates of allotment, one bearing date of June 16, 1901, and the other June 28, 1902, describing the land in controversy. Said certificates were attached to said complaint, and identified as proper exhibits. He further alleges that, prior to the execution and delivery to him of said deed by the grantor, said Robert James conveyed said land to the defendant, the Iowa Land & Trust Company, by an instrument of writing in the shape and form of a deed, for the consideration of \$250, and that said instrument bears the date of November 2, 1904, and was executed and delivered by said grantor to the said defendant for the purpose of securing a loan. Plaintiff attaches a copy of said deed to said complaint as a part thereof, and identified same as an exhibit, alleging that said deed was for the purpose of securing borrowed money, and being so understood at the time by all parties thereto, and was intended for the purpose of securing the payment of a note, evidencing a debt for such borrowed money, and that when the plaintiff became the purchaser of said land on April 29, 1905, he purchased the same from said grantor with the understanding that said instrument, in favor of the defendants, was merely a mortgage; and in the settlement between the plaintiff and the said grantor, it was so agreed at the time, and a sufficient sum was reserved by the plaintiff out of the consideration for the payment of said land, to take up the said note held by the said defendant, in order to have canceled and set aside the deed held by it.

Plaintiff alleges that he has made an effort to settle with the defendant, and that defendant refused to settle for less than \$400, which is in excess of the mortgage debt; that he now offers to pay into court, as a tender to defendant, the principal and interest due on the aforesaid loan made by the defendant to Robert James. Plaintiff further alleges that the said Robert James, the grantor in plain-

tiff's deed, is a citizen of the Seminole Nation, not of Indian blood, and it is further alleged that no patent has been issued and delivered to him by the Principal Chief last elected by the Seminole Tribe, as provided in the Seminole agreement of December 16, 1897; that no patents have been delivered and executed, by said Principal Chief, to any of the citizens of the Seminole Nation, whether of Indian blood or not of Indian blood. Plaintiff further alleges that said Robert James, heretofore mentioned, has selected his homestead out of the land allotted to him in the Seminole Nation, and that the land described in defendant's complaint is no part of the homestead of Robert James. Plaintiff further alleged that said note, evidencing the debt due by said Robert James, is now and was due and payable at the time this action was instituted, wherefore plaintiff prays that said deed or instrument of writing be declared in fact and in equity a mortgage, and, as such, foreclosed by proper decree, divesting the title out of the defendant, and vesting it in the plaintiff, being upon the payment of the amount of indebtedness due the defendant by said Robert James on said note, and if said relief cannot be granted, a commission be appointed to reconvey the title by deed to the plaintiff, and such other and general relief as it may be entitled to.

Thereafter, on the 24th day of April, 1906, the defendant demurred to said amended complaint, for the reason that the facts therein stated were not sufficient to constitute a cause of action; and thereafter, on the 26th day of June, 1906, said demurrer was by the court sustained, to which action at the time the plaintiff then and there excepted; and, defendant failing to plead further, a decree was therein rendered in favor of the defendant, dismissing plaintiff's amended complaint, and taxing all the costs against him, plaintiff at the time duly saving his exception to the action of the court. Thereafter the plaintiff duly prosecuted its appeal to the United States Court of Appeals of the Indian Territory, and the same is now properly before this court, by virtue of the provisions of the Enabling Act, for determination.

Gibson & Ramsey, for plaintiff in error. Thomas & De Meules, for defendant in error.

WILLIAMS, C. J. (after stating the facts as above)—The question to be adjudicated in this case is whether or not a citizen of the Seminole Nation, not of Indian blood, after selecting his allotment and receiving his certificate of allotment from the chairman of the Commission to the Five Civilized Tribes, as provided for by the agreement of the 16th day of December, A. D. 1897, on the part of the Seminole Nation of Indians with the United States of America, ratified by an Act of Congress, approved on the 1st day of July, 1898 (30 Stat. 567, c. 542; 1 Kappler's *Indian Affairs, Laws, and Treaties* (2d Ed.) p. 662), can make a valid sale, deed, or conveyance to that part of his or her allotment not selected as his or her homestead, after the removal of the restrictions on the alienation by the Indian Appropriation Act, approved April 21, 1904, although no patent had been issued or delivered to such allottee before he undertakes to alienate the same.

That we may properly understand the provisions of the Seminole treaty of 1897, it is important that we examine the treaty made and concluded at Washington, D. C., March 21, 1866, between the United States Government and the Seminole Nation, and ratified on the 19th day of July, 1866. It is by virtue of this treaty that the Seminoles acquired the title or right to the property in controversy. Article 3 of said treaty (14 Stat. 72; 2 Kappler's *Indian Affairs, Laws, and Treaties*, p. 911), provides as follows: "The United States having obtained by grant of the Creek Nation, the westerly half of their lands, hereby grants to the Seminole Nation the portion thereof hereafter described which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to-wit: * * * In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted by the sum paid by the United States for Seminole land under the stipulations above written. * * *

Section 15 of an Act of Congress, approved March 3, 1893 (27 Stat. 645, c. 209), in part is as follows: "The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and

sixty acres to any one individual within the limits of the country occupied by the Cherokee, Creek, Choctaws, Chickasaws and Seminoles; and upon such allotment the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States." Said act further provides for the appointment of commissioners to enter into negotiations with the Five Civilized Tribes for the purpose of extinguishing their national and tribal titles to land. Section 16 of said act is in part as follows: "The President shall nominate, and by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation, the Seminole Nation, for the purpose of extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a state or states of the Union which shall embrace the lands within said Indian Territory."

When we consider the foregoing excerpts from the Act of March 3, 1893, light is thrown upon the agreement, afterwards entered into on the 16th day of December, 1897, heretofore referred to. The said agreement in part provides as follows: "All lands belonging to the Seminole Tribe of Indians shall be divided into three grades, designated as the first, second, and third, * * * and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered, giving to each the right to select his allotment so as to include any improvements thereon owned by him at the time, and each allottee shall have the sole right to occupancy of the land so allotted to him during the exist-

ence of the present tribal government and until the members of said tribe shall become citizens of the United States; * * * and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him." Obviously, upon the selection of his allotment and the receipt, by the allottee, of a certificate signed by the chairman of the Commission of the Five Civilized Tribes, the land described in said certificate was segregated from the common mass of Seminole land. It could not thereafter be allotted to any other citizen. The allottee could not be deprived of the same, either by the federal government, or the Indian tribes.

In the case of *Wirth v. Branson*, 98 U. S. 118, 25 L. Ed. 86, the court stated: "The rule is well settled by a long course of decisions that, where public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract shall be regarded as the equitable owner thereof, and the land is no longer open to selections. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first selection or entry be vacated and set aside."

In the case of *Landes v. Brant*, 10 How. (U. S.) 372, 13 L. Ed. 449, the court says: "Cruise on Real Property (Volume 3, pp. 510, 511) lays down the doctrine with great distinctness." He says: "There is no rule better founded in law, reason, and conscience than this: That all the several acts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." For the purpose of this case (without proposing to apply the rule to every other) we may assume that the first act of Claymorgan was that of filing his title papers and claim with the recorder of land titles, according to the fourth section of the Act of March 3, 1805. This was legally done, and the papers recorded. He claimed under the second section of the Act of 1805, which was amended by the Act of 1806, and again by the Act of 1807. As already stated, by the fourth section of this last act, the decision of the board of commissioners, appointed to investigate such

claims, is made final against the United States, and he was entitled to a patent. His claim was fully within the provisions of the Acts of 1805 and 1807. Applying the doctrine of relation, and taking all the several parts and ceremonies necessary to complete the title together, 'as one act,' then the confirmation of 1811 and the patent of 1845 must be taken to relate to the first act—that of filing the claim in 1805. On this assumption intermediate conveyances made by the confirmee, or by the sheriff on his behalf, of a date after the first substantial act, are covered by the legal title, and pass that title to alienee. And on this ground the deed made by the sheriff to McNair is valid."

In the case of *Carroll v. Safford*, 3 How. 460, 11 L. Ed. 671, the court says: "But, independently of the force of usage, we think the construction is sustainable. When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held it for a final certificate, which could no more be canceled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee. It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect it is considered as belonging to the realty. Now, why cannot such property be taxed by its proper denomination as 'real estate'? In the words of the statute, 'as lands owned by non-residents.' And if the name of the owner could not be ascertained, the tract was required to be described by its boundaries, or in any particular name. We can ascertain, no doubt, that the construction given to this act by the authorities of Michigan, in regard to the taxation of land sold by the United States, whether patented or not, carried out the intention of the law-making power."

In the case of *Witherspoon v. Duncan*, 71 U. S. 210, 18 L. Ed. 342, the court says: "Arkansas covenanted to

abstain from taxation of the public lands within her limits, and to refrain from legislation that should impede the federal government in disposing of them, or interfere with the regulation of Congress for the security of titles. It is clear that the government has not been hindered in selling them, nor Congress obstructed in securing titles; but it is claimed the contract has been violated, because these lands, when taxed, were owned by the United States. In no just sense can lands be said to be public lands after they have been entered at the land office, and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act. According to the well-known mode of proceeding at the land offices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts, by means of which, in due time, he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title. As the patent emanates directly from the President, it necessarily happens that years elapse, before, in the regular course of business in the General Land Office, it can issue; and if the right to tax was in abeyance during this time, it would work a great hardship to the state, for the purchaser, as soon as he gets his certificate of entry, is protected in his proprietary interest, can take possession, and make lasting and valuable improvements, which it would be difficult to separate from the freehold for the purpose of taxation. * * * This question was fully considered by this Court in *Carroll v. Safford*, 3 How. (U. S.) 450, 11 L. Ed. 671, and the views we have presented only reaffirm the doctrines of that case. But it is insisted that there is a difference between a cash and a donation entry—that the one may be complete when the money is paid, but the other is not perfected until it is confirmed by the General Land Office, and the patent

issued. That Congress has the entire control of the public lands, can dispose of them for money, or donate them to individuals or classes of persons, cannot be questioned. If the law on the subject is complied with, and the entry conforms to it, it is difficult to see why the right to tax does not attach as well to the donation as to the cash entry. In either case, when the entry is made and certificate given, the particular land is segregated from the mass of public lands, and becomes private property. In the one case, the entry is complete when the money is paid; in the other, when the required proofs are furnished. In neither can the patent be withheld if the original entry was lawful. In the case of *Lessee of French et ux. v. Spencer*, 21 How. (U. S.) 239, 16 L. Ed. 97, Mr. Justice Catron, speaking for the court, said: 'Whether the patent related back in support of Spencer's deed is now a question in this Court.' It arose in the case of *Landes v. Brant*, 10 How. (U. S.) 372, 13 L. Ed. 449, where it was held that a patent, issued in 1845 'to Claymorgan and his heirs,' by which the heirs took the legal title, related back and inured to the protection of a title, founded on a sheriff's sale of Claymorgan's equitable interest, made in 1808. There, as here, the contest was between the grantee's heirs and the purchaser of the incipient title; the court holding that when the patent issued, it related to the inception of title, and must be taken, as between the parties to the suit, to bear date with the commencement of title."

In the case of *Doe ex dem. Mann et al. v. Wilson*, 23 How. (U. S.) 461, 16 L. Ed. 584, Mr. Justice Catron, speaking for the court, said: "By the treaty of October 27, 1832, made by the United States, through commissioners, with the Pottawatomie Tribe of Indians of the state of Indiana and Michigan Territory, said nation ceded to the United States their title and interest in and to their lands in the states of Indiana and Illinois, and the Michigan Territory south of Grand river. Many reservations were made in favor of Indian villagers, jointly and to individual Pottawatomies. The reservations are by sections, amounting probably to 100, lying in various parts of the ceded country. As to these, the Indian title remained as it stood before the treaty was made; and to complete the title as to the reserved lands the United States agreed that they would issue patents to the respective owners.

One of these reservees was the chief Pet-chi-co, to whom was reserved two sections. The treaty also provides 'that the foregoing reservations shall be selected under the direction of the President of the United States, after the land shall have been surveyed, and the boundaries shall correspond with the public surveys.' In February, 1833, by a deed in fee simple, Pet-chi-co conveyed to Alexis Coquillard and David H. Colerick, of the state of Indiana, 'all those sections of land lying in the state aforesaid, in the region of country or territory ceded by the treaty of 27th October, 1832.' The grantor covenants lawful authority to sell and convey the same, and he furthermore, warrants the title against himself and his heirs. Under this deed the defendant holds possession. The lessors of the plaintiff took a deed from Pet-chi-co's heirs, dated 1855, on the same assumption that their ancestors' deed was void; having died in 1833, before the lands were surveyed, or the reserved sections selected. And on the trial below the court was asked to instruct the jury 'that Pet-chi-co held no interest, under the treaty, in the lands in question, up to the time of his death, that was assignable; he having died before the location of the land, and before the patents issued.' This instruction the court refused to give; but, on the contrary, charged the jury that 'the description of the land in the deed from Pet-chi-co to Coquillard and Colerick, from Colerick to Coquillard, and from Coquillard to Wilson, are sufficient to identify the land, thereby intended to be conveyed, as the same two sections of land which are in controversy in this suit, and which are described in the patents which have been read in the evidence.' * * * The only question presented by the record that we felt ourselves called on to decide is whether Pet-chi-co's deed of February, 1833, vested his title in Coquillard and Colerick. The Pottawatomie Nation was the owner of the possessory right of the country ceded, and all the subjects of the nation were joint owners of it. The reservees took by the treaty, directly from the nation, the Indian title; and this was the right to occupy, use, and enjoy the lands, in common with the United States, until partition was made, in the manner prescribed. The treaty itself converted the reserved sections into individual property. The Indians as a nation reserved no interest in the territory ceded; but,

as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land, to which the United States title was either added, or promised to be added, and it matters not which, for the purpose of this controversy for possession. The United States held the ultimate title, charged with the right of undisturbed occupancy and perpetual possession, in the Indian nation, with the exclusive power in the government of acquiring the right. *Johnson v. McIntosh*, 8 Wheat. (U. S.) 603, 5 L. Ed. 681; *Cornet v. Winton's Lessee*, 2 Yerg. (Tenn.) 147. Although the government alone can purchase lands from an Indian nation, it does not follow that, when the rights of the nation are extinguished, an individual of the nation, who takes as a private owner, cannot sell him interest. The Indian title is property and alienable, unless the treaty had prohibited its sale. *Cornet v. Winton's Lessee*, 2 Yerg. (Tenn.) 148; *Blair and Johnson v. Potthkiller's Lessee*, 2 Yerg. (Tenn.) 414. So far from this being the case in the instance before us, it is manifest that sales of the reserved sections were contemplated, as the lands ceded were forthwith to be surveyed, sold, and inhabited by white population, among whom the Indians could not remain. We hold that Petchi-co was a tenant in common with the United States, and could sell his reserved interest; and that when the United States selected the lands reserved to him, and made partition (of which the patent is conclusive evidence), his grantees took the interest he would have taken if living. In the case of *Crews et al. v. Burcham et al.*, 1 Black (U. S.) 357, 17 L. Ed. 91, the court said: 'Some expressions in the opinion delivered in the case of *Doe v. Wilson*, the first case that came before us arising out of this treaty, were the subject of observation by the learned counsel for the appellant in the argument, but which were founded on a misapprehension of the scope and purport.' It was supposed that the court had held that the reservee was a tenant in common with the United States after the treaty of cession, and until the surveys and patent. It will be seen, however, that the tenancy in common there mentioned referred to the right to occupy, use, and enjoy the lands in common with the government, and had no relation to the legal title."

In the case of *Crews v. Burcham*, 1 Black (U. S.)

352-358, 17 L. Ed. 91, the treaty under consideration by the court being that with the Pottawatomie tribe of October 27, 1832, by which the nation ceded all its lands in Illinois and other states, subject to certain regulations, the court said: "It is true that no title to the particular lands in question could rest in the reservee, or in his grantee, until the location by the President, and, perhaps, the issuing of the patent, but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent is absolute and imperative, and founded on a valuable and meritorious consideration. The lands reserved constituted a part of the compensation received by the Pottawatomies for the relinquishment of their right of occupancy to the government. The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or, in case he had parted with his interest, in favor of his grantees. And the obligation is not the less imperative and binding because entered into by the government. The equitable right, therefore, to the lands in the grantee of Beison, when selected, was perfect; and the only objection of any plausibility is the technical one as to vesting of the legal title."

Mr. Justice Field, in *Stark v. Starr*, 6 Wall. (U. S.) 418, 18 L. Ed. 925, says: "The right to patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentees, so far as it may be necessary, to cut off intervening claimants. If the patent relates back to the inception of the right to it to cut off intervening claimants, with equal reason and justice it must relate back to estop the patentee from asserting title against his grantee under warranty deed made before the patent actually issued, and after his right to it had become absolute."

In the case of *Francis v. Francis*, 203 U. S. 238, 27 Sup. Ct. 129, 51 L. Ed. 167, Mr. Justice Harlan, speaking for the court, said: "The third article is in the following words: 'There shall be reserved for the use of each of the persons hereinafter mentioned, and their heirs, which persons are all Indians by descent, the following tracts of

land, to be located at and near the Grand Traverse of the Flint river, in such manner as the President of the United States may direct.' It is very clear that, if a fee simple estate was intended to be granted, the parties to the treaties were unfortunate in the choice of terms by which to give effect to that intention; and yet it is difficult to conceive that any other estate was in the contemplation of the parties at the time of its existence. Will, then, the third article warrant such a construction? It will be observed that the reservation is to the use of Mokitchenoqua and 'her heirs.' No limitation as to the time of holding, or restriction upon the right of alienation, is contained in the grant. The use of the word 'heirs' clearly implies that such an estate was granted as would, upon her death, descend to her legal representatives. Here, then, are all the essential elements of a fee simple estate. This construction, we think, is justified by the words of the third article, and is strengthened by the fact that it corresponds, not only with the opinion given by the Attorney General of the United States to the Secretary of War (Land Laws, pt. 2, pp. 96, 97), but with the opinion of the Senate—a branch of the treaty-making power—which is certainly entitled to great consideration (3 Senate Doc. 1836, No. 197). Again, in the same case, the court said: 'The location of the lands became a duty, devolving on the President, of the treaty. This duty he could execute with an Act of Congress, the treaty, when ratified, being the supreme law of the land, which the President was bound to see executed. It was impossible to describe the tract granted to any of the reservees in the treaty, as it is matter of history that none of the lands ceded had ever been surveyed. But locality is given to the grant by the terms of the treaty, with authority to locate afterwards by a survey making it definite. *Smith v. United States*, 10 Pet. (U. S.) 326, 9 L. Ed. 444. This authority being executed, the grant then became as valid to the particular section designated by the President as though the description had been incorporated in the treaty itself. We are therefore of opinion that a fee simple passed to the reservee, Mokitchenoqua, by force of the treaty itself, and that the rights of the parties could in no wise be affected by the subsequent act of the President directing a patent to be issued.' The court further says: 'In *Dewey v.*

Campau, 4 Mich. 565, 566, the court, interpreting the same treaty, said: "A title in fee under this clause of the treaty passed, by this language, to the reservee." The term 'reservation' was equivalent to an absolute grant. The title passed as effectually as if the grant had been executed. The title was conferred by the treaty. It was not, however, perfect until the location was made. The location was necessary to give it identity. The location was duly made, and thus the title to the land in controversy was consummated by giving identity to that which was before located."

In the case of *Jones v. Meehan*, 175 U. S. 4, 20 Sup. Ct. 2, 44 L. Ed. 51, the court said: "By article 9 of the treaty: 'Upon the urgent request of the Indians, parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of Thief river for the chief Moose Dung, and a like reservation of six hundred and forty acres for the chief Red Bear on the north side of Pembina river.' * * * Moose Dung selected as his reservation, under the ninth article of this treaty, 640 acres, a part of which was lot 1 in section 34, including the strip now in controversy; and he lived on that land at the mouth of Thief river, and made it his home, and had a log house, a garden, and a fish trap there. He died in 1872, before the lands were surveyed, and was succeeded, as chief, by his eldest son, who had been born at Red Lake in 1828, and who was known to the whites by the same name of Moose Dung or Monsimoh, and to the Indians as Mayskokonoyay, meaning 'The one that wears the red robes'; and, ever since the making of the treaty, his father and himself, in succession, sustained tribal relations with the Red Lake band of Chippewa Indians, and that band continued to be recognized as an Indian tribe by the government of the United States. * * * The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief of another member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property, the reservation

unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of treaty or an Act of Congress, have expressly or impliedly prohibited or restricted its alienation. * * * The title to the strip of land in controversy, having been granted by the United States to the elder chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs and usages of the tribe, to his eldest son and successor, as chief, Moose Dung, the younger, passed by the lease, executed by the latter in 1891, to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the executive departments. The constructions of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself. * * *

In the case of *Wallace v. Adams*, 143 Fed. 720, 74 C. C. A. 540, the United States Circuit Court of Appeals for the Eighth Circuit, in construing the Choctaw-Chickasaw agreements, containing provisions for the allotment of land in said nations therein, said: "The Commission, under the direction of the Secretary, is a special tribunal, vested with the power to hear and determine the claims of all parties to allotment in these lands and to execute its judgment by the issuance of the allotment certificates, which constitute conveyance of the title to the lands to the parties whom they decide are entitled to the property. * * * The allotment certificate, when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that a party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee." This case was affirmed by the Supreme Court of the United States. See *Wallace v. Adams*, 204 U. S. 419, 27 Sup. Ct. 363, 51 L. Ed. 547.

The case of *Quinney v. Denney*, 18 Wis. 485, was a case involving the right of the allottee to sell his allotment before patent was issued. That was an action in ejectment, and it appears that the land was never filed on or

taken until 1845, fifteen years before the date of the patent. The court held that the law or treaty gave the allottee an equivalent title in this patent. It said. "Now we are of the opinion that this act failed to give to the allottee an equitable estate or title in the land allotted to him, which could be sold and transferred by, as that where the patent subsequently issued. We think this side of the brief for the counsel for the appellant right. *Strother v. Lucas*, 12 Pet. (U. S.) 410, 9 L. Ed. 1137; *Stoddard v. Chambers*, 2 How. (U. S.) 284, 11 L. Ed. 269; *Grignon v. Astor*, 2 How. (U. S.) 319, 11 L. Ed. 283; *Les Bois v. Bramell*, 4 How. (U. S.) 449, 11 L. Ed. 1051; *Marsh v. Brooks*, 8 How. (U. S.) 223, 12 L. Ed. 1056; *Landes v. Brant*, 10 How. (U. S.) 348, 13 L. Ed. 449; *United States v. Brooks*, 10 How. (U. S.) 442, 13 L. Ed. 489; *French v. Spencer*, 21 How. (U. S.) 228, 16 L. Ed. 97; *Berthold v. McDonald*, 22 How. (U. S.) 334, 16 L. Ed. 318; *Dee v. Wilson*, 23 How. (U. S.) 458, 16 L. Ed. 584; *Crews v. Burcham*, 1 Black (U. S.) 352, 17 L. Ed. 91; *Challefoux v. Ducharme*, 4 Wis. 554."

The Supreme Court of the United States has uniformly held that the patent, issued to the purchaser by the government, is not a new acquisition of title. It is only a confirmation of the right which the patentee had before the patent was issued. *Cornelius v. Kessel*, 128 U. S. 456-463, 9 Sup. Ct. 122, 32 L. Ed. 482; *Stoddard v. Chambers*, 2 How. (U. S.) 284, 11 L. Ed. 269; *Bissell v. Penrose*, 8 How. (U. S.) 317, 12 L. Ed. 1095; *Shepley v. Cowan*, 91 U. S. 330-340, 23 L. Ed. 424; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 65-68, 16 Sup. Ct. 939, 41 L. Ed. 72; *Deffenback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; *Spiess v. Neuberg*, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211; *Faull v. Cooke*, 19 Or. 455, 26 Pac. 662, 20 Am. St. Rep. 836; *Morrison v. Faulkner*, (Tex. Civ. App.) 21 S. W. 984; *Rozell v. C., M. & L. Co.* (Ark.), 89 S. W. 469; *Frost v. Missionary Society*, 56 Mich. 62, 22 N. W. 203; *Jackson v. Ramsay*, 3 Cow. (N. Y.) 76, 15 Am. Dec. 242; 3 Washburn, Real Property (6th Ed.) § 2034.

In May, 1863, Congress passed an Act, providing that in all cases where patents for public lands have been or may be hereafter issued in pursuance to any law of the United States, if a person who had died, or shall here-

after die, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs of the devisees or assigns of such deceased as if the patent had been issued to the deceased patentee during life. Act May 20, 1836, c. 76, 5 Stat. 31.

In the case of *Oliver v. Forbes*, 17 Kan. 127, it was held that this act applied to the case of an Indian who had received his land under a treaty with the United States. After citing a number of cases referring to patent issued after the death of the patentee, the Kansas Supreme Court said: "If the patent is valid, it is so merely because it is in confirmation of other existing rights, and not because it created any new rights."

In the case of *Briggs v. Wash-puk-qua* (C. C.) 37 Fed. 135, the validity of a conveyance executed before patent was issued was involved, and Judge Foster said: "The right to the patent was absolute and complete, and the duty of the Secretary of the Interior to issue the patent was imperative."

In the case of *Porter v. Parker*, 68 Neb. 338, 94 N. W. 123, the court said (referring to Act Cong. Aug. 7, 1882, c. 434, 22 Stat. 342, which is as follows): "That upon the approval of the allotments provided for in the preceding sections by the Secretary of the Interior, he shall cause patents to issue therefore, in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for a period of twenty-five years in trust for the sole use and benefit of the Indian to whom the allotment shall have been made, or in case of his decease, of his heirs according to the laws of the state of Nebraska, and at the expiration of said period, the United States will convey the same by patent to said Indian or his heir as aforesaid, in fee discharged of said trust and free of all incumbrance and charge whatever, and if any conveyance shall be made of the land set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, that the law of descent and partition in force in the said state shall apply thereto after patents have been executed and delivered.' On the 29th day of December, 1884, a patent for 160 acres, or a quarter section, of such

lands, reciting, in substance, the terms of the foregoing section of the statute, was issued to one Phillip Porter, a member of the tribe, in satisfaction of his right to participate in such allotment. At that time Porter was the head of a family, consisting, besides himself, of his wife, the defendant, Ne-da-wa Parker, and of a daughter. After the delivery of the patent Porter died intestate, leaving his wife and daughter surviving. Some time afterwards the daughter died, also intestate, and without issue. The allottee was the son of Daniel Porter, the plaintiff in this action. Since the death of her husband and daughter the defendant has remained in the exclusive possession of the land, claiming to be lawfully entitled thereto. The foregoing matters were submitted to the District Court of Thurston county upon an agreed statement of facts, praying the judgment of the court whether the plaintiff or defendant has the better right in the premises. To review a judgment in favor of defendant the plaintiff prosecutes a petition in error in this Court." The court further states: "In our opinion an allottee and patentee of lands in severalty, pursuant to the above-mentioned Act of Congress, is seized of an equitable interest and estate in fee, which, upon his death, before the issuance of a final patent therefor by the United States, descends to his or her heirs at law, according to the laws of inheritance of this state."

The syllabus in the case of *McCauley v. Tyndall*, 68 Neb. 685, 94 N. W. 813, is as follows: "Under Act Cong. Aug. 8, 1882, c. 434, 22 Stat. 341, entitled 'An Act to provide for the sale of a part of the reservation of the Omaha Tribe of Indians in Nebraska,' etc., the widow of an allottee, dying before the issuance of a final patent, and without issue, takes a life estate in the allotment to her husband, remainder to his father."

The right of a person who has located a valid land certificate upon vacant public land, and has caused such land to be surveyed, and the survey and certificate to be returned to the General Land Office within the time prescribed by law, is a vested legal right, and is entitled to all the protection of all the constitutional guaranties with which such rights are hedged. *Howard v. Perry*, 7 Tex. 259; *Hamilton v. Avery*, 20 Tex. 612; *Milam County v. Bateman*, 54 Tex. 153; *Gullett v. O'Connor*, 54 Tex. 408;

Snider v. Methvin, 60 Tex. 487; *Jones v. Lee*, 86 Tex. 25, 22 S. W. 386, 1092; *Threadgill v. Bickerstaff*, 87 Tex. 520, 29 S. W. 757; *Olcott v. Ferris* (Tex. Civ. App.) 24 S. W. 848; *Sherwood v. Fleming*, 25 Tex. Sup. 408; *Thompson v. Dumas*, 85 Fed. 517, 29 C. C. A. 312.

The lands of the Seminole Nation belong to the nation in its sovereign capacity, and not to its citizens as tenants in common. The lands and money of the Seminole Nation are public property and public moneys, and are not held in an individual ownership. *Stephens v. Cherokee Nation*, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041.

In the Cherokee Nation the land is held by virtue of a patent, issued by the federal government on the 1st day of December, 1838, pursuant to treaty stipulation, which provides as follows: "Therefore in the execution of the agreements and stipulations contained in the said several treaties, the United States have governed and granted unto the said Cherokee Nation the two tracts of land so surveyed and hereinbefore described, containing in the whole 14,374,135.14 acres, to have and to hold the same, together with all the rights, privileges and appurtenances thereunto belonging, to the said Cherokee Nation forever; subject, however, to the rights of the United States to permit other tribes of red men to get salt on the salt plains of the Western Prairie, referred to in the second article of the treaty of December, 1835," etc.

As to the Creek Nation, Article 3 of Treaty of February 14, 1833 (7 Stat. 417), provides: "The United States will grant a patent in fee simple to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States, and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation and continue to occupy the country hereby assigned them"; and afterwards the patent was issued in accordance with this treaty stipulation.

As to the Choctaw Nation, Article 2 of Treaty of September 27, 1830 (7 Stat. 333), provides: "The United States under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi river, in fee simple to them and their descendants,

to inure to them while they shall exist as a nation and live on it."

President Tyler in 1842 executed the patent, pursuant to the provisions of said treaty. The habendum clause of the same is as follows: "To have and to hold the same with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging as intended to be conveyed by the aforesaid article in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States or with their consent."

By virtue of the Treaty of 1837 (11 Stat. 573) the Chickasaws and Choctaws jointly held the Choctaw grant on the same terms that the Choctaws previously held it. By virtue of Treaty of June 22, 1855, it was provided that a certain district in the Choctaw Nation should be occupied by the Chickasaws, and that the land included in both the Choctaw and Chickasaw district was to be held in common, so that each and every member of said tribes shall have an equal and undivided interest in the whole. Article 1 of said Treaty is as follows: "And pursuant to an Act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw Tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal, undivided interest in the whole. *Provided, however,* no part thereof shall ever be sold without the consent of both tribes, and that said lands shall revert to the United States if said Indian and their heirs become extinct or abandon the same."

Whilst we hold that, in the case of the Seminole Nation, the land and moneys of that tribe are public property, and are not held in an individual ownership, it is not to be inferred that the same rule applies to all the other nations of the Five Civilized Tribes. Such question not being before us, the same is specifically reserved.

There can be no serious question of the authority of Congress to remove the restrictions upon the alienation of land of the allottees without the consent of the tribe. *Thomas v. Gay*, 169 U. S. 264-266, 18 Sup. Ct. 340, 42 L. Ed. 740; *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct.

1076, 41 L. Ed. 244; *Cherokee Tobacco Co.*, 11 Wall. (U. S.) 616, 20 L. Ed. 227. In Section 15, *supra*, of the Act of Congress of March 3, 1893, wherein the Congress consents to the allotment of the lands in severalty not exceeding 160 acres of land to any one individual within the limits of the country occupied by the Cherokee, Creek, Choctaw, Chickasaw and Seminole Nations, it was carrying out the settled policy theretofore existing on the part of the general government toward the Indian tribes. In the various treaties made in 1866 between the United States Government and the Five Civilized Tribes it is apparent that it was contemplated that these lands should be ultimately allotted in severalty. And said Section 15 was evidently inserted with the view that the Indian tribes, upon their own initiative, if they so elected, might proceed with such allotment, and that such allottees would, by virtue of Section 6, C. 119, 24 Stat. at Large 390, *supra*, by the completion thereof, and the issuing and delivering of patents, become citizens of the United States.

In the succeeding section, which is Section 16 of said Act, Congress also contemplated the initiation of such movement on the part of the Federal Government. In other words, the United States Government, by an Act of Congress of March 3, 1893, said to the members of the Five Civilized Tribes: "It is our policy to extinguish the Indian title in your county, and, allotment in severalty being necessary to accomplish this, we consent that you may proceed with the allotment, but, at the same time recognizing the fact that there are grave doubts of your acting upon such suggestions, commissioners on the part of the General Government shall be appointed to negotiate with you looking to that end, in order to bring about the ultimate creation of a state or states of the Union, which shall embrace the lands comprising your territory." And as a result of that negotiation the treaty of the 16th day of December, 1897, was consummated, providing for the classification of the lands and the division of the same. As was said by the court in the case of *Witherspoon v. Duncan*, *supra*, it necessarily happens, in consummating the machinery of allotment, and the issuance of patents for the same in the reasonable expedition of such business, that years may elapse before the same finally issue.

Further, it must have been intended by the words

"that each allottee shall have the sole right of occupancy of the land so allotted to him during the existence of the present tribal government" to exclude the tribal authorities, under their tribal authority, from attempting to deprive such allottee of the individual use thereof. In other words, it was the purpose of Congress to bring to an end public ownership, and it was perfectly natural to insert a provision that would exclude, during the continuance of the tribal government, the tribal authorities from doing anything that would continue such possession and use of such allotment. It is further provided that each allottee shall have the sole right of occupancy of the land so allotted to him until the members of said tribe shall become citizens of the United States. Under Section 6, C. 119 (24 Stat. 390), *supra*, the allottee would not become a citizen of the United States until the patent was issued to him. Said section is as follows. "That upon the completion of said allotments and the patenting of said lands to said allottee, each and every member of the respective bands or tribes of Indians to whom the allotment shall be made shall have the benefit of and be subject to the laws, both civil and criminal, in the state or territory in which they reside; and no state or territory shall pass a law denying any such Indian within its jurisdiction the equal protection of the law, and every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this Act or under any law of the territory, and every Indian born within the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared a citizen of the United States and entitled to all the rights, privileges and immunities of such citizens, whether said tribe has been or not, by birth or otherwise, a member of any tribe of Indians within the United States, without in any manner affecting the right of such Indian or tribe to other property."

Afterwards Congress, by Act March 3, 1901, C. 868, 31 Stat. 1447, provided: "That Section 6 of Chapter 119 of the U. S. Statutes at Large No. 24, page 390, is hereby amended as follows, to-wit: After the words 'civilized life' in line 13 of said Section 6 insert the words 'and

every Indian in the Indian Territory'." And, later, Congress provided by Act, April 21, 1904, C. 1402, 33 Stat. 204, as follows: "And all the restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe upon application of the United States Indian agent at the Union agency in charge of the Five Civilized Tribes, if said agent is satisfied, upon full investigation of each individual case, that the removal of said restrictions is for the best interest of said allottee." Why did Congress include the Seminole Nation within the provisions of this Act, unless it would have had the effect to render lands alienable in said nation?

With the Act of March 3, 1893, for the allotment and division of the lands in severalty among the Indians with the view of the ultimate creation of a state, this Act, removing restrictions as to alienation, accords. Just as the General Government, by donation and homestead Acts, has laid the predicate for the establishment and building of homes within other states erected out of the territories, in the country of the Five Civilized Tribes, where no public domain existed for settlement by the non-citizens therein, the necessity arose for the removal of restrictions on alienation that the Indian might have opportunity to sell and convey to his non-citizen neighbor and home builder, such a course being to the mutual advantage of both races, to bring about individual ownership, erect a state and industrially and commercially develop the same. And with like purpose it is provided in the treaty of December 16, 1897, as follows: "The townsite of Wewoka shall be controlled and disposed of according to the provisions of an Act of the General Council of the Seminole Nation, approved April 23, 1897, relative thereto; and upon the extinguishment of the tribal government deeds of conveyance shall issue to owners of lots as herein provided for allottees; and all lots remaining unsold at that time may be sold in such manner as may be prescribed by the Secretary of the Interior."

It certainly would not be contended that when a lot of the Wewoka townsite was sold to the purchaser, and the consideration therefor had been paid, and the pur-

chaser had gone into possession, and a certificate for the purchase price had been issued by the proper officer of the Seminole Nation, such purchaser would not have had an equitable estate in fee in said lot. This construction is in accord with a uniform rule laid down by the United States Supreme Court. But if it were a question of first impression, to make any other ruling would be contrary to sound reason. For it states that upon the extinguishment of the tribal government these "conveyances shall issue to owners of lots as herein provided for allottees and all lots remaining at that time may be sold in such manner as may be prescribed by the Secretary of the Interior."

An admission is therein contained that the purchaser of said lot was the owner thereof. How did he get to be the owner? By purchasing and paying for the same? Suppose that said treaty had also had a provision in it that such purchaser of such lot should not alienate or incumber the same in any way until said conveyance had been executed by the proper tribal authorities, and afterwards that prohibition as to alienation or incumbrance had been repealed, would anyone have the hardihood to contend that such lot would not then become alienable? A similar question was passed on by the Supreme Court of the United States in the case of *Barney v. Dolph*, 97 U. S. 656, 24 L. Ed. 1063. Chief Justice Waite, delivering the opinion for the court, said: "The only question within our jurisdiction presented by this record is whether, after a husband and wife had perfected their right to a patent for lands in Oregon, under Donation Act September 27, 1850, C. 76, 9 Stat. 496, and after the amendment of July 17, 1854 (10 Stat. 306, C. 85), they could, before receiving the patent, sell and convey the lands so as to cut off the rights of the children or heirs of the husband or wife, in case of his or her death before the patent was actually issued. This depends upon the effect to be given the original Act, when construed in connection with the amendment. The original Act, after providing for a grant to the husband and wife of 640 acres of land, one-half to the husband and one-half to the wife in her own right, declared that: 'In all cases where such married persons have complied with the provisions of this [the] act, so as to entitle them to the grant as

above provided, whether under the late provisional government of Oregon, or since, and either shall have died before patent issued, the survivor and children or heirs of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament, duly and properly executed according to the laws of Oregon'; and then, 'that all future contracts by any person or persons entitled to the benefits of this Act, for the sale of the land to which he or they may be entitled under this Act before he or they shall have received their patent therefor, shall be void.' The amendment of 1854 repealed this prohibition of sales.

"The point to be decided is not whether, before the amendment, such a conveyance could have been made, or whether, if the conveyance had not been made, the children or heirs of a deceased husband or wife would take by descent or purchase, or whether the grant from the United States was one which took effect from the time of the passage of the Act, or a subsequent entry and settlement; but whether after the amendment the husband and wife held by such a title that, before patent, but after their right to one had become absolute, they could sell and convey, so as to vest in the purchaser either a legal or equitable estate in fee simple—legal, if the title had already passed out of the United States by virtue of the Act of Congress and a full compliance with its provisions; equitable, if the patent was needed to perfect the grant. The question is one of legislative intent, to be ascertained by examining the language which Congress has used, and applying it to the subject matter of the legislation. The prohibition of sales, although contained in Section 4, applied to all persons entitled to the benefit of the Act, and its repeal was, under the circumstances, equivalent to an express grant of power to sell. The prohibitions were of the sale, before patent, of the land to which the settler was entitled under the Act. The repeal, therefore, operated, under the circumstances, the same as a grant of power to sell the land, even though a patent had not issued. This, in the absence of anything to the contrary, implied the power to convey all the Government had parted with. When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the Government was concerned, to a patent actually

issued. We so decided in *Stark v. Starr, supra*. The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with the duty. An authorized sale of a settler, therefore, after his right to a patent had been fully secured, was, as to the Government, a transfer of the ownership of the land."

It is clear that under the provisions of the Treaty of the 16th day of December, 1897, when a member of the Seminole Tribe selected his allotment, the same being segregated from the common mass of the Seminole land, after the issuance of the certificate to him therefor, his right thereto became absolute and indefeasible; that by the terms of the treaty he was to have the sole right of occupancy during the existence of the tribal government, the tribal authorities thereby being excluded from continuing any further public occupancy so far as said allotment was concerned, and it being contemplated by said treaty that a patent should be issued to the allottee immediately on the expiration of the tribal government, it naturally followed that such member of the Seminole Tribe would then and there become a citizen of the United States. It was further, then, the intention of Congress to restrict the alienation of all of said allotment until the expiration of the tribal government, by the insertion of the following clause in said treaty agreement, to-wit: "All contracts for sale, disposition or incumbrance or any part of any allotment made prior to the date of patent shall be void." In fine, it was provided that, during the existence of the tribal government, each allottee shall have the sole right of occupancy of his allotment, and until the members of the tribe shall become citizens of the United States. Then follows the restrictions of the alienation until the patent shall be issued. When all such restrictions on alienation were removed, what prevented the allottee herein from executing a valid conveyance?

Further, Congress, in Section 16, C. 1876, entitled "An Act to provide for the final disposition of the Five Civilized Tribes in Indian Territory, and for other purposes," approved April 26, 1906, provides that: "Conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to the removal of restrictions, where pat-

ents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to the issuance and recording and delivery of patent deed; but this shall not be held construed to affect the validity or invalidity of such conveyance except as hereinbefore provided." When we consider this provision, in connection with the Act of April 21, 1904, removing all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, and except as to homesteads, in the light of *Barney v. Dolph, supra*, and the other authorities heretofore cited, unquestionably the allottee herein could convey all of his allotment, except that portion designated by him as his homestead.

In the case of *Pickering v. Lomax*, 145 U. S. 310, 12 Sup. Ct. 860, 36 L. Ed. 716, it was held that the consent of the Secretary of the Interior was effective, though given after the execution of the deed. In that case the patent of the Indian contained a stipulation, authorized by treaty, that the land should not be conveyed to any person whatever without permission of the President of the United States. A deed was made to the Indian, however, August 2, 1858, which was approved by the President January 21, 1871, nearly thirteen years thereafter; and it was held that the approval related back of the time of the execution of the deed, and made it valid as to that deed, regardless of the claim of any intervening parties. In the case of *Lykins v. McGrath*, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485, it is held that the consent of the Secretary of the Interior to a conveyance by one holding under a patent, containing a restricting stipulation, may be given after the execution of the deed, and, when given, is retroactive in its effect, and relates back to the date of the conveyance, regardless of the claim of intervening parties, whose alleged rights accrued subsequent to the date of the conveyance. What was the intention of Congress, when it removed restrictions from alienation of allottees not of Indian blood, as to their surplus allotment in the Seminole country? If the construction contended for by defendant in error is correct, that Act of Congress, removing restrictions as to allottees in the Seminole Nation, was without effect whatever, because at the time the tribal government had not terminated, nor has it yet.

We accordingly conclude that the herein allottee, Robert James, a member of the Seminole Tribe, but not of Indian blood, after selecting his allotment, and designating his homestead, and receiving his certificate of such allotment from the chairman of the Commission to the Five Civilized Tribes, as provided for in the agreement of December 16, 1897, became the equitable owner of the same, vested with an indefeasible title therein, and that the duty or obligation to issue a patent therefor was imperative, and not discretionary, with the tribe or government, and could make a binding sale, deed, or conveyance on that part of his allotment not selected as a homestead, after the removal of the restrictions or alienation by the Indian Appropriation Act, approved April 21, 1904, although no patent had been issued or delivered to said allottee before he undertook to alienate the same.

The other question raised in this record is whether or not, where an instrument, appearing on its face as a deed in the form of a warranty, is confessed by the demurrer to have been intended as a mortgage, the owner of the land subject to the mortgage may in equity have said instrument declared to be a mortgage, and under such have the right to redeem the property. This is well settled under the authorities. See Pomeroy's Eq. Juris., Secs. 1192-1196; *White v. Henry et al*, 13 Ark. 112; *Wells v. Morrow*, 38 Ala. 125; 4 Mayfield's Dig. Ala., p. 200.

The judgment of the lower court is reversed and remanded, with instructions to overrule defendant's demurrer, and proceed in accordance with this opinion. All the justices concur.

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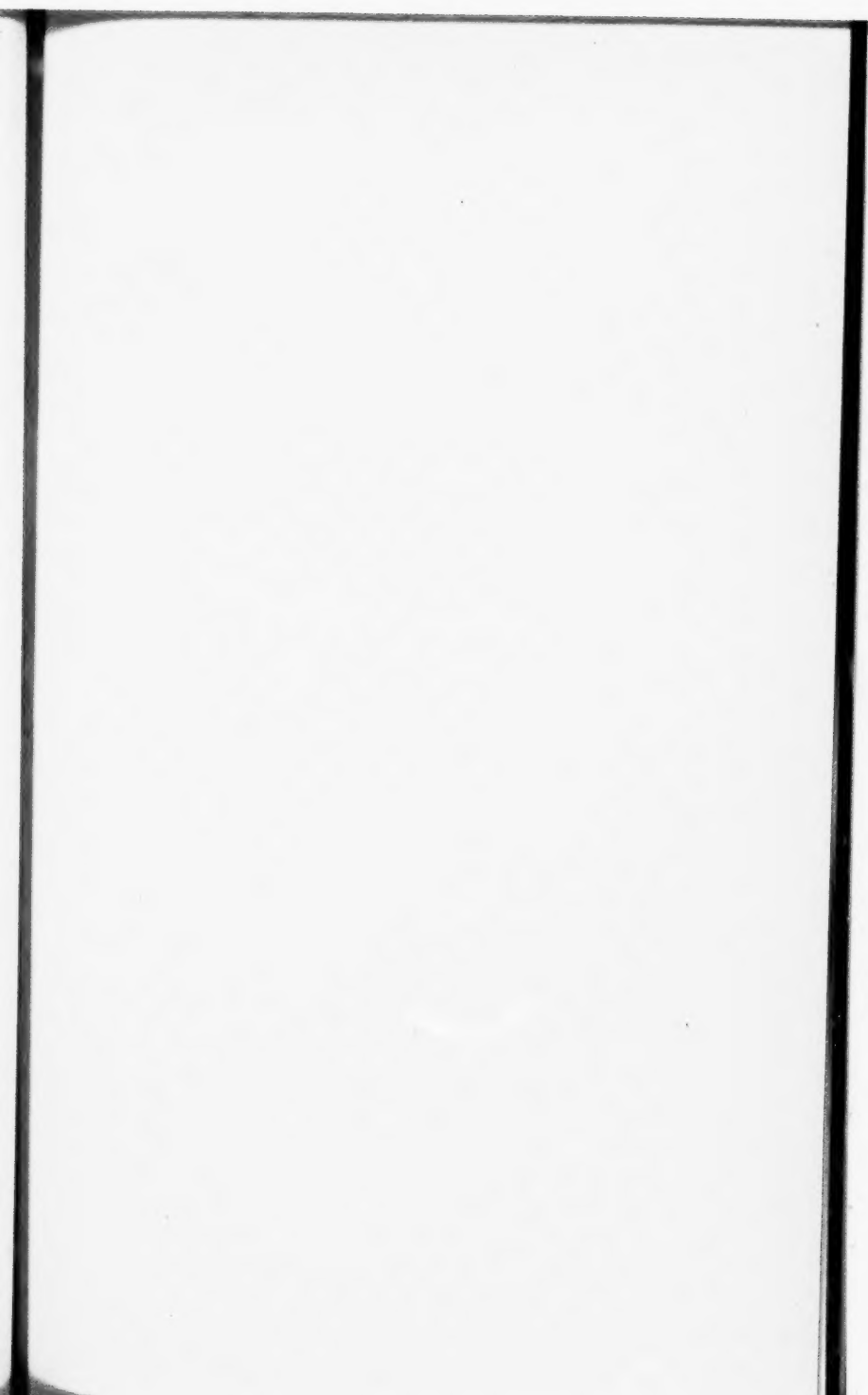
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HECKMAN v. UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 496. Argued October 12, 13, 1911.—Decided April 1, 1912.

The United States has capacity to maintain a suit to set aside conveyances made by allottee Indians of allotted lands within the statutory period of restriction; and this suit brought against numerous defendants, all of whom were grantees of allottees of the same tribe, is properly maintainable in equity; the return of the consideration to the grantee is not essential; there is no defect of parties because the allottee Indians making the conveyances are not joined; there is no misjoinder of causes of action, and the bill is not multifarious.

Congress has power to extend the restrictions upon alienation of allotted lands by allottee Indians, *Tiger v. Western Investment Co.*, 221 U. S. 286; and so held that the provision for extending the period of alienation of lands allotted in severalty to full-blood Cherokees in the act of May 27, 1908, 35 Stat. 312, c. 199, is a valid exercise by Congress of its power over Indian affairs.

The relations of the United States to the Cherokee Indians as established by treaties and statutes reviewed, and held that in executing the policy of extinguishing the tribal organization and title, and the allotment of the tribal lands in severalty, the intent of Congress was to fulfill the national obligation, not only by an equitable apportionment of the property but by safeguarding through suitable restrictions the individual ownership of the allottees.

The placing of restrictions upon the right of alienation was an essential part of the plan of individual allotment of tribal lands among the members of the Five Civilized Tribes; and such restrictions evinced the continuance to this extent of the guardianship of the United States over the Indians as wards of the Nation.

Conferring citizenship upon an allottee Indian is not inconsistent with retaining control over his disposition of lands allotted to him. *Tiger v. Western Investment Co.*, 221 U. S. 286.

The maintenance of limitations prescribed by Congress as part of its plan for distribution of Indian lands is distinctly an interest of the United States, and one which it may sue in its own courts to enforce.

A transfer of allottee lands in violation of statutory restrictions is not simply a violation of the proprietary rights of the Indian but of the governmental rights of the United States.

Where there is a violation of the rights of the United States, and a justiciable question as to the effect thereof, the United States may invoke the jurisdiction of a court of equity, and a pecuniary interest in the controversy is not essential. *United States v. American Bell Telephone Co.*, 128 U. S. 315.

Congress has power to authorize the Government to sue to maintain the statutory restrictions upon alienation of Indian allottee lands. *Minnesota v. Hitchcock*, 185 U. S. 373.

Where Congress has power to authorize the Government to sue, an appropriation for expenses of suits already brought is a recognition of the right to bring them; and so *held* that the provisions of the act of May 27, 1908, 35 Stat. 312, c. 199, and of subsequent acts making appropriations for suits brought to cancel conveyances made by Cherokee allottee Indians in violation of statutory restrictions on alienation are within the power of Congress.

The presence of the Indian grantors as parties to suits brought by the United States to set aside conveyances of allotted lands made in violation of statutory restrictions on alienation is not essential; nor are the grantees placed in danger of double litigation by reason of the absence of the grantors as parties.

The effect of an act of Congress passed in pursuance of a policy and a matter of general knowledge cannot be destroyed so as to assist those who attempted to profit by violating its provisions; and so *held* that when a conveyance is made by an allottee Indian in violation of statutory restrictions on alienation, the return of the consideration is not an essential prerequisite to a decree of cancellation.

Quære, but not presented on this record, whether cases may arise where, without interfering with the policy of restricting alienation,

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the decree should provide in cancelling the transfers for a return of the consideration and the bringing in as parties of any person whose presence might be necessary.

The bill in a suit brought to cancel for the same reason in each instance a large number of conveyances of allotted lands, made by different members of the same tribe to different defendants, *held not to be* multifarious in this case as it is manifestly in the interest of justice to avoid unnecessary suits; nor is there in such a case a misjoinder of causes of action.

179 Fed. Rep. 13, modified and affirmed.

THE United States by its Attorney-General, upon the recommendation of the Secretary of the Interior, brought this suit in the Circuit Court of the United States for the Eastern District of Oklahoma to cancel certain conveyances of allotted lands made by members of the Cherokee Nation. Demurrer to the bill was sustained by the Circuit Court and the bill was dismissed. *United States v. Allen, and similar cases*, 171 Fed. Rep. 907. The judgment was reversed by the Circuit Court of Appeals and the trial court was directed to proceed with the suits in accordance with the views expressed in its opinion. 179 Fed. Rep. 13.

The Government states in its brief that between July 14, 1908, and October 12, 1909, the United States brought 301 bills in equity against some 16,000 defendants to cancel some 30,000 conveyances of allotted lands, made by as many or more grantors, members of the Five Civilized Tribes, upon the ground that the conveyances were in violation of existing restrictions upon the power of alienation. It is said that the selection and grouping of defendants in each case was determined by the substantial identity of the facts and propositions of law upon which the question of alienability of the lands depended.

Forty-six bills were filed to cancel 3715 conveyances of lands of Cherokee Indians.

This particular suit deals with conveyances by Cherokee allottees of the full-blood of 18⁷⁴ allotted subsequent

to the act of April 26, 1906. 34 Stat. 137, c. 1876. The grantors were not made parties. There are involved a number of separate conveyances to distinct grantees, parties defendant, two of whom prosecute this appeal from the judgment of the Circuit Court of Appeals.

The bill alleges that under the treaties between the United States and the Cherokee tribe of Indians and its members, the United States granted to the Cherokee tribe certain lands in the Indian Territory, now the Eastern District of Oklahoma, and obligated itself by the terms of these treaties and of its laws to protect the Cherokee tribe in the enjoyment of the lands granted; that according to the terms of said treaties and laws, and of the patent to the lands, the Cherokee tribe and every member thereof have at all times been and now are without power to dispose of any interest in the lands without the authority of the United States, or otherwise than in the manner it prescribed; that the Government of the United States, by reason of the helpless and dependent character of the Indian tribes, and of their several members, is the guardian and has exclusive control of their property, by virtue of which there is imposed upon the United States the duty to do whatever may be necessary for their guidance, welfare and protection; that the Cherokee tribe has always been and is now treated as a tribe of Indians by the Government of the United States and its several branches; that this tribe is now under the care of an Indian agent duly appointed under the laws of Congress, and large sums are still appropriated by Congress for the benefit and protection of the tribe and of its individual members, and for the maintenance of schools; and that under the laws of Congress the Government of the United States still has a large sum of money in its possession belonging to the tribe, and there still remains unallotted a large area of tribal lands, the common property of the tribe.

It is further alleged that in the exercise of its powers to

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regulate and govern the affairs of the Cherokee tribe of Indians and its members, having in view their welfare and the carrying out of its treaty obligations, Congress by the act approved July 1, 1902 (32 Stat. 716, c. 1375), provided that the lands belonging to the Cherokee tribe in the present State of Oklahoma should be allotted in severalty among its members, but deeming the Indians to be untutored and improvident and still requiring the protection and supervision of the General Government, it was provided by this act that the portion of the lands so allotted as homesteads should be inalienable, and further that the allotted lands other than homesteads should be alienable only in five years after the issuance of patent to the allottee, and that, in accordance with its provisions, the act of Congress was duly ratified by the Cherokee people on the seventh day of August, 1902.

The bill describes certain conveyances of lands situated in the Eastern District of Oklahoma made by Cherokee Indians to the defendants, respectively, with particulars as to the lands embraced in the conveyances, the consideration, the dates of execution, acknowledgment and recording, and also the dates of the allotment certificates and of the recording of allotment deeds. The dates of the conveyances were between November 19, 1904, and May 7, 1908, and of the allotment certificates between April 30, 1906, and May 4, 1908. It is alleged that each of the tracts of land described was land of the Cherokee tribe which had been allotted to full-blood Indians of that tribe, that is, to those mentioned as grantors in the conveyances specified; that they were so allotted as to be subject to restrictions upon their alienation and incumbrance, and were so subject at the date of the execution and recording of the deeds described, which restrictions have never been removed; that the facts concerning the allotments and restrictions were matters of public record and notorious, and that the restrictions were im-

posed by public laws of the United States of which the defendants had knowledge and by which they were put upon inquiry and notice as to all matters concerning the condition of the particular tracts of land mentioned in the bill; that the deeds had been secured by the defendants in willful violation of law and of the duty which rested upon this Nation and every member thereof, and for the purpose of unlawfully incumbering the allotted lands; and that by causing the deeds to be recorded the defendants had unlawfully obtained an apparent title or interest of record in the lands described in defiance of said agency supervision and in open violation and contempt of the laws of the United States to the irreparable injury of the Indians and in direct interference with the supervision and control, policy and duty of the Government of the United States in that behalf.

It is also averred on information and belief that the defendants have unlawfully secured from members of the Cherokee tribe other deeds, conveyances, mortgages, powers of attorney and contracts for and about their allotments, which the Indians and freedmen were without authority to make; that as these have not been recorded the complainant is unable to give a minute and correct description without the discovery prayed for; that the defendants are continuing to induce the members of the Cherokee tribe named in the bill and other members of said tribe to execute deeds and instruments for and about their allotments, and threaten that they will continue such unlawful acts; that this unlawful conduct will greatly harass the United States in the discharge of its duties and in the administration of its policy in relation to these Indians and compel it to bring many suits in order to annul the deeds and instruments which the defendants have taken and are taking as alleged; that in addition to the instruments specified in the bill upward of four thousand instruments of a similar nature purporting to con-

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vey or to incumber the title to lands located within the Eastern District of Oklahoma and duly allotted to members of the Five Civilized Tribes or belonging to said tribes, have been executed and placed on record by the defendants herein and other persons and corporations in contravention of the treaties, entered into between the United States and the several Indian tribes, and the laws of the United States; and that unless the United States shall be permitted to join in its bills numerous defendants, against each of whom it has a like cause of action, and against each of whom it seeks the same relief, and whose pretended claims are based upon similar facts and involve precisely the same questions of law, it will be driven to the necessity of bringing a great number of distinct and separate suits, and that it will be practically impossible for the United States to prosecute, and for the courts to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time.

The bill prays that the specified conveyances be declared void and that the title to the lands described be decreed to be in the allottees or their heirs, subject to the terms, conditions and limitations contained in the treaties, agreements and laws of the United States. Discovery of all claims to lands allotted to any of the Cherokee tribe or to unallotted lands of the tribe, and the surrender of instruments for cancellation, are sought; and it is also prayed that all defendants in possession, or claiming possession, be ordered to vacate or to cease making such claims, and that the United States have such other and further relief as may be proper.

The objections to the sufficiency of the bill as set forth in the demurrers are thus summarized in the appellants' brief:

(1) That the United States has no capacity to maintain the suit.

(2) That the bill is wholly without equity.

- (3) That there is a defect of parties.
- (4) That there is a misjoinder of alleged causes of action.
- (5) That the bill is multifarious.

The appeal from the judgment of the Circuit Court of Appeals, which reversed the judgment of the Circuit Court sustaining the demurrers, is taken under § 3 of the act of June 25, 1910, c. 408 (36 Stat. 837).

Mr. Joseph C. Stone, Mr. Robert J. Boone and Mr. S. T. Bledsoe for appellants: ¹

For treaties and statutory provisions affecting the lands of allottees in the Five Civilized Tribes, see as to Tribal Titles, of the Choctaws and Chickasaws, Treaties of October, 1820, 7 Stat. 210; September 27, 1830, 7 Stat. 333; of 1837, 11 Stat. 57; of 1855, act of Congress of May 28, 1830; Treaty of 1855, 11 Stat. 611; of 1866, 14 Stat. 769; of the Creeks; Treaty of February 1, 1833, 7 Stat. 417, and patent issued pursuant thereto; of 1852; Treaty of August 7, 1856; of the Seminoles; Art. 1 of Treaty of 1856, 11 Stat. 699; Art. III of Treaty of 1866, 14 Stat. 755; of the Cherokees; Treaty of May 6, 1828; of August 6, 1846, 9 Stat. 871.

As to title of allottees to individual allotments, see Atoka Agreement with the Choctaws and Chickasaws, § 29, act of June 28, 1898, 30 Stat. 495, and Supplemental Agreement, 32 Stat. 641; § 3, original Creek Agreement, 31 Stat. 861; Seminole Agreement, December 16, 1897, 30 Stat. 567; Cherokee Agreement, 32 Stat. 716.

All the above provisions with reference to the allotment of lands of the various tribes should be considered and

¹ The succeeding cases of *Mullen v. United States*, *post*, p. 448; *Gout v. United States*, *post*, p. 458; and *Deming Investment Co. v. United States*, *post*, p. 471, which were appeals taken by different parties from the decrees entered by the Circuit Court of Appeals in *United States v. Allen* and similar cases, 179 Fed. Rep. 13, were argued simultaneously, with this case.

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construed in the light of the previous legislation looking to allotment.

For legislation affecting all five of the tribes, see act of March 3, 1893, 27 Stat. 645, authorizing the appointment of commissioners.

Pursuant to the authority conferred upon this commission to enter into agreements with the Five Civilized Tribes for the allotment in severalty of their lands and the provision that on the allotment of the lands held by such tribes, respectively, the reversionary interest of the United States therein should be relinquished and should cease, negotiations were entered into, resulting in the agreements above quoted from.

Relinquishment as used in this connection is correctly interpreted in *United States v. Joseph*, 94 U. S. 614.

When the members of each of the Five Civilized Tribes select, as required by the provisions referred to, the lands they desire to take in allotment, and that selection is approved, nothing further remains to be done by such members in order to perfect their title to the lands so selected. The issuance of the allotment certificate and patent which follows are mere ministerial acts. It requires neither allotment certificate nor patent to pass title to the allottee. The provision that "there shall be allotted," etc., contained in the various agreements is sufficient when the land is selected and designated to pass title to the allottee without the necessity of certificate or patent. *Wallace v. Adams*, 143 Fed. Rep. 716; *Jones v. Meehan*, 175 U. S. 1, 16; *Doe v. Wilson*, 23 How. 457; *Quinney v. Denney*, 18 Wisconsin, 485; *Crews v. Burcham*, 1 Black, 352; *French v. Spencer*, 21 How. 228; *Stark v. Starrs*, 6 Wall. 402; *Lamb v. Davenport*, 18 Wall. 307; *Ryan v. Carter*, 93 U. S. 78; *Best v. Polk*, 18 Wall. 112; *Oliver v. Forbes*, 17 Kansas, 113; *Clark v. Lord*, 20 Kansas, 390; *Francis v. Francis*, 99 N. W. Rep. 000, 203 U. S. 233; *United States v. Torrey*, 154 Fed. Rep. 263; *United States*

v. *Moore*, 154 Fed. Rep. 712; *New York Indians v. United States*, 170 U. S. 1.

The mere existence of restriction upon alienation imposed for the protection of the allottee vests no interest whatever in the United States in reversion or otherwise. A violation of the statute imposing restrictions upon alienation does not in any event redound to the interest of the United States or impair the title of the allottee. *Libby v. Clark*, 118 U. S. 250, 255; *Schrimpscher v. Stockton*, 183 U. S. 290, 299.

The whole estate having vested in the allottee, there can be no possible interest remaining in the United States. Not even a possibility of forfeiture or reversion.

The United States owns no property interest upon which to maintain this action, nor may the same be maintained for the protection of citizens, generally, against violations of law.

The sole authority of the Circuit Courts of the United States to exercise jurisdiction over causes where the United States is plaintiff or petitioner, is given by the act of August 13, 1888, 25 Stat. 434. For its construction see *United States v. Sayward*, 160 U. S. 493; *United States v. Payne Lumber Company*, 206 U. S. 467; *United States v. Anger*, 153 Fed. Rep. 671; *United States v. Paine Lumber Company*, 154 Fed. Rep. 263.

The former members of the Five Civilized Tribes are citizens of the United States and the State of Oklahoma, and not wards of either the state or the National Government. *Mackey v. Cox*, 18 How. 100; *Mehlin v. Ice*, 56 Fed. Rep. 12.

Allotment agreements were made by the various tribes and approval thereof given by Congress as follows:

Seminole Original Allotment Agreement (30 Stat. 567);
Seminole Supplemental Allotment Agreement (31 Stat. 250); Choctaw and Chickasaw Allotment Agreement (30

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Stat. 495-505); Supplemental Allotment Agreement (32 Stat. 641); Creek Allotment Agreement (31 Stat. 861); Creek Supplemental Agreement (32 Stat. 500), and Cherokee Allotment Agreement (32 Stat. 716).

The policy of isolation from surrounding country applied to Indians on Indian Reservations was never, in fact, applied to the territory of the Five Civilized Tribes. In 1890 there were 180,182 persons residing in Indian Territory, of whom 51,279 were Indians. In 1900, the population of Indian Territory had increased to 392,000, of which 52,500 were Indians. In 1890 the Indian population, which included a few more Indians than those of the Five Civilized Tribes, constituted 25.5 per cent of the total population and in 1900, 13.4 per cent.

These conditions, and the progress made in securing of allotment agreements with the various tribes, caused Congress in 1901 to deem it advisable to confer the full rights of citizenship upon every Indian in the Indian Territory. See act of March 3, 1901, 31 Stat. 1447.

For effect of the General Allotment Act of 1887 as applied to conditions similar to those in Oklahoma with reference to citizenship, see *United States v. Saunders*, 96 Fed. Rep. 268; *United States v. Kopp*, 110 Fed. Rep. 161; *Ex parte Viles*, 139 Fed. Rep. 68; *United States v. Dooley*, 151 Fed. Rep. 697; *United States v. Auger*, 153 Fed. Rep. 671; *Ex parte Savage*, 158 Fed. Rep. 214; *United States v. Boss*, 160 Fed. Rep. 132.

No such public policy exists as that upon which the jurisdiction of the trial court was sustained by majority of the Circuit Court of Appeals.

The allottees are indispensable parties. They own the lands involved and have such an interest in the subject-matter of the controversies that final decrees cannot be made without affecting their interest.

Every party to a contract of sale except one who has released his interest or an agent through whom the title

has passed is a necessary party to set it aside. *Shields v. Barrow*, 17 How. 130; *Coiron v. Millaudon*, 19 How. 113; *Gaylords v. Kelshaw*, 1 Wall. 81; *Ribbon v. Railroad Cos.*, 16 Wall. 446; *Lawrence v. Wirtz*, 1 Wash. C. C. 417; *Tobin v. Walkinshaw*, 1 McAll. 26; *Bell v. Donohoe*, 17 Fed. Rep. 710; *Florence Machine Co. v. Singer Mfg. Co.*, 8 Blatchf. 113; *Chadbourne v. Coe*, 45 Fed. Rep. 822; *Empire C. & T. Co. v. Empire C. & M. Co.*, 150 U. S. 159; *New Orleans W. Co. v. New Orleans*, 164 U. S. 471; *S. C.*, in C. C. A., 51 Fed. Rep. 479; *Clark v. Great Northern Ry. Co.*, 81 Fed. Rep. 282; but see *French v. Shoemaker*, 14 Wall. 314; *West v. Duncan*, 42 Fed. Rep. 430; *Smith v. Lee*, 77 Fed. Rep. 779.

In every case where the parties acted in good faith the court ought to decree a personal judgment against the allottees for the amount of the consideration, for it was paid by mistake and the consideration for the payment has failed. If the contracts were void, but in good faith, equity will impute a promise to repay. *Wrought Iron Bridge Co. v. Utica*, 17 Fed. Rep. 316; *City of Louisiana v. Wood*, 12 Otto, 294; *Marsh v. Fulton County*, 10 Wall. 676; *Tate v. Gains* (Okla.), 105 Pac. Rep. 193.

Though the void deeds will be treated as nullities, the law will imply just such an obligation to pay for the enhanced value to the premises on account of the improvements as the Secretary of the Interior would have permitted the allottees to contract upon proper application to him. Where the lands had no rental value, and, on account of the improvements so made in good faith, now have a great rental value, it should be decreed that the rentals or a part thereof be set aside each year until compensation shall have been made for the same. *Muskogee Development Co. v. Green* (Okla.), 97 Pac. Rep. 619; *White v. Brown* (Ind. T.), 38 S. W. Rep. 335; *Poplin v. Clausen*, 38 S. W. Rep. 974; *Shumate v. Harbin*, 15 S. E. Rep. 270; *Brockway v. Thomas*, 36 Arkansas, 518; *Beard v. Dansby*,

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48 Arkansas, 182; 2 S. W. Rep. 701; *Potts v. Cullum*, 68 Illinois, 217.

The United States cannot maintain this bill. It is wholly devoid of equity. The United States has not offered to return the consideration; it is out of possession, and if the facts alleged are true, it has an adequate remedy at law. *Frost v. Spittley*, 121 U. S. 552; *Orton v. Smith*, 18 How. 263; *Dick v. Foraker*, 155 U. S. 404, 414; *United States v. Wilson*, 118 U. S. 86.

If the conveyances referred to are void they constitute no cloud upon the title of the owner thereof, and a bill will not lie to cancel the same, even though the other grounds of equitable jurisdiction are present. *United States v. Saunders*, 96 Fed. Rep. 268; *Piersol v. Elliott*, 6 Pet. 96, 101; *Rich v. Braxton*, 158 U. S. 375, 407; *Kennedy v. Hazelton*, 128 U. S. 667, 672; *Town of Venice v. Woodruff*, 62 N. Y. 462, 467; *March, Executrix, v. The City of Brooklyn*, 59 N. Y. 280.

The bill of complaint is multifarious.

The Solicitor General and *Mr. A. N. Frost* and *Mr. Harlow A. Leekley*, Special Assistants to the Attorney General, for the United States:

The United States may by suit in equity enforce the restrictions imposed by it upon the alienation of allotted tribal lands by members of the Indian tribes. *Marchie Tiger v. Western Investment Co.*, 221 U. S. 286; *United States v. Allen*, 179 Fed. Rep. 13; *Conley v. Ballinger*, 216 U. S. 84; *United States v. Kagama*, 118 U. S. 375; *Worcester v. Georgia*, 6 Pet. 515; *In re Debs*, 158 U. S. 564; *United States v. Am. Bell Tel. Co.*, 128 U. S. 315; *United States v. San Jacinto Tin Co.*, 125 U. S. 273; *United States v. Rickert*, 188 U. S. 432; *In the Matter of Heff*, 197 U. S. 488; *Beck v. Flournoy Live Stock Co.*, 65 Fed. Rep. 30; *United States v. Flournoy Live Stock &c. Co.*, 69 Fed. Rep. 886; *Pilgrim v. Beck*, 69 Fed. Rep. 895; *United States v. Flour-*

noy &c. Co., 71 Fed. Rep. 576; *Rainbow v. Young*, 161 Fed. Rep. 835.

The Indian allottees are not necessary parties to such a suit, as the United States has rights and interests of its own to conserve and is, moreover, under obligation to protect the Indians in those restrictions. *United States v. Allen*, 179 Fed. Rep. 13; *United States v. Am. Bell Tel. Co.*, 128 U. S. 315; *United States v. San Jacinto Tin Co.*, 125 U. S. 273; *United States v. Hammers*, 221 U. S. 220; *Marchie Tiger v. Western Investment Co.*, 221 U. S. 286; *United States v. Trinidad Coal Co.*, 137 U. S. 160; *Pilgrim v. Beck*, 69 Fed. Rep. 895.

The bill is not multifarious for it joins only such transactions as depend for their validity or invalidity upon the same state of facts and the same propositions of law. Story on Equity Pleading, 14th ed., § 539; Jennison's Chancery Practice, 26; *Hale v. Allinson*, 188 U. S. 56; *Ill. Cent. R. R. Co. v. Caffrey*, 128 Fed. Rep. 770; *Bitterman v. L. & N. R. R. Co.*, 207 U. S. 205.

MR. JUSTICE HUGHES, after making the above statement, delivered the opinion of the court.

The conveyances, which this suit was brought to cancel, were executed by members of the Cherokee tribe of Indians, of the full-blood, of lands allotted to them in severalty. The statute under which the allotments were made (act of July 1, 1902, c. 1375, 32 Stat. 716), accepted by the Cherokee nation on August 7, 1902, provided that the lands should be inalienable for a period specified. Sections 11-15 (*Id.*, p. 717). The lands in question were "surplus" lands, that is, those other than homesteads. While the restrictions, applicable to lands of this character, were still in force, Congress extended the period of inalienability by the act of April 26, 1906. 34 Stat. 137, c. 1876. Section 19 of this act (*Id.*, p. 144) is as follows:

"SEC. 19. That no full-blood Indian of the Choctaw,

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Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however*, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

The power of Congress thus to extend the restriction upon alienation was sustained by this court in *Tiger v.*

Western Investment Co., 221 U. S. 286. There the question related to a conveyance of inherited lands, made by a Creek Indian, of the full-blood, without the approval of the Secretary of the Interior as required by § 22 of the act of 1906. The conveyance had been executed after the expiration of the five-year limitation upon alienation, prescribed by the supplemental agreement with the Creek Nation (act of June 30, 1902, c. 1323, § 16; 32 Stat. 503); but meanwhile, and during the continuance of the original restriction, the act of 1906 had been enacted. It was held that the restriction of the later statute was valid.

The reasoning of this decision is conclusive as to the validity of the extension by § 19 of the act of 1906 of the period of inalienability of lands allotted, as in this case, to full-blood Cherokees. And the same principle governs the restrictions provided by the act of May 27, 1908, c. 199, 35 Stat. 312.

It is not open to dispute that, upon the facts alleged, all the conveyances specified in the bill in this suit were executed in violation of restrictions lawfully imposed.

The principal question now presented is with respect to the capacity of the United States to sue in its own courts to enforce these restrictions.

The relations of the United States to the Cherokees have repeatedly been described in the decisions of this court. *Cherokee Nation v. Georgia*, 5 Pet. 1; *Worcester v. Georgia*, 6 Pet. 515; *United States v. Rogers*, 4 How. 567; *Mackey v. Coxe*, 18 How. 100; *The Cherokee Trust Funds*, 117 U. S. 288; *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641; *United States v. Old Settlers*, 148 U. S. 427; *Cherokee Nation v. Journeycake*, 155 U. S. 196; *Stephens v. Cherokee Nation*, 174 U. S. 445; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *Lowe v. Fisher*, 223 U. S. 95. But in view of the nature of the present controversy the facts of main importance may be briefly restated.

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The United States made its first treaty with the Cherokees on November 28, 1785 (7 Stat. 18). Constituting one of the most powerful tribes of Indians which then inhabited the country, they claimed the principal part of the territory now comprised within the States of North and South Carolina, Georgia, Alabama and Tennessee. By this treaty, the Cherokees acknowledged that they were under the protection of the United States of America and of no other sovereign, the boundary of their hunting grounds was fixed, and it was provided that "for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating trade with the Indians, and managing all their affairs in such manner as they think proper." Another treaty with similar objects was made on July 2, 1791 (7 Stat. 39). In 1817, following a migration of a portion of the tribe to lands of the United States on the Arkansas and White Rivers, the Cherokee Nation ceded to the United States certain tracts which they formerly held, and in exchange the United States bound themselves to give to that branch of the Nation on the Arkansas as much land as they had received, or might thereafter receive, east of the Mississippi. 7 Stat. 156 (July 8, 1817). A further cession of land was made to the United States in 1819. 7 Stat. 195 (February 27, 1819).

By the terms of the treaty of May 6, 1828 (7 Stat. 311, 315), with the representatives of the Cherokee Nation, West, reciting the purpose of securing to them and their friends and brothers from the east who might join them, "a permanent home" which should "under the most solemn guarantee of the United States be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines or placed over it the jurisdiction of a Territory or State,"

the United States agreed to guarantee to the Cherokees forever seven millions of acres of land, as described, situated in what became known as the Indian Territory, and, in addition, "a perpetual outlet, West, and a free and unmolested use of all the Country lying West of the Western boundary of the above described limits, and as far West as the sovereignty of the United States and their right of soil extend." On May 28, 1830, Congress authorized the President to assure title to the Indians to such exchanged lands, and to execute a patent if desired, "provided always, that such lands shall revert to the United States, if the Indians become extinct or abandon the same." 4 Stat. 411. A supplementary treaty confirming the guarantee of lands and fixing boundaries was made on February 14, 1833. 7 Stat. 414.

The continued presence of the Eastern Cherokees gave rise to serious controversies and oppressive legislation in the States where they resided. To terminate these difficulties and "with a view to reuniting their people in one body," a treaty was signed at New Echota, in the State of Georgia, on December 29, 1835. 7 Stat. 478. The Cherokee Nation ceded to the United States all their land east of the Mississippi River in consideration of the payment of five million dollars; and in addition to the lands described in the treaties of 1828 and 1833, the United States agreed to convey to the Cherokees eight hundred thousand acres for the sum of five hundred thousand dollars. It was stipulated that the ceded lands should not at any future time, without the consent of the Cherokee Nation, be included "within the territorial limits or jurisdiction of any State or Territory," and the United States agreed to secure to the Cherokee Nation "the right by their national councils" to make such laws as might be deemed necessary "for the government and protection of the persons and property within their own country belonging to their people or such

persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same."

The two tracts—the one consisting of the seven million acres and the "outlet," together aggregating 13,574,135.14 acres, and the other of 800,000 acres—were conveyed to the Cherokee Nation by patent on December 31, 1838, subject to the condition specified in the act of 1830, that the land should revert to the United States if the Cherokee Nation should become extinct or abandon the same. On September 6, 1839, the Cherokees adopted a constitution for the reunited nation. Dissensions having arisen among the members of the tribe, a new treaty was made with the United States on August 6, 1846 (9 Stat. 871), in which it was set forth that the lands occupied by the Cherokee Nation should "be secured to the whole Cherokee people for their common use and benefit," and provision was made for the settlement of differences. There was a further treaty on July 19, 1866. 14 Stat. 799.

The "Cherokee Outlet" was purchased by the United States in 1893 for the sum of \$8,595,736. 27 Stat. 640.

At this time, the conditions in the Indian Territory were most unsatisfactory. There had been a large accession of whites who made no claim to Indian citizenship and were residing in the Territory with the approval of the Indian authorities. These greatly outnumbered the Indians. The existing means of government had failed of their purpose, and an exigency had arisen, originally unforeseen, requiring the adoption of new measures. This led to the enactment of legislation which contemplated

the dissolution of the tribal organizations and the distribution of the tribal property. By § 15 of the act of March 3, 1893, c. 209 (27 Stat. 612, 645), it was provided: "The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States, . . . and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease." And by § 16 of the same act provision was made for the appointment of commissioners to enter into negotiations with the Five Civilized Tribes "for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such and [*sic*] adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within such India [*sic*] Territory."

But in executing this policy, Congress was solicitous to conserve the interests of the Indians and to fulfill the national obligation, not simply by assuring an equitable apportionment of the property, but by safeguarding the individual ownership of allottees through suitable restric-

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tions which were designed to secure them in their possession and to prevent their exploitation.

The necessity for legislative action, and the purposes to be subserved, were fully presented in the report submitted in May, 1894, by the Senate Committee on the Five Civilized Tribes (S. Rept. No. 377, 53d Cong. 2d Sess.), a portion of which is quoted in the statement of facts made by the court in *Stephens v. Cherokee Nation*, *supra*, pp. 447-451. The committee said (p. 448): "This section of the country was set apart to the Indian with the avowed purpose of maintaining an Indian community beyond and away from the influence of white people. We stipulated that they should have unrestricted self-government and full jurisdiction over persons and property within their respective limits, and that we would protect them against intrusion of white people, and that we would not incorporate them in a political organization without their consent. Every treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of the Indians from the whites and non-participation by the whites in their political and industrial affairs. We made it possible for the Indians of that section of country to maintain their tribal relations and their Indian polity, laws and civilization if they wished so to do. And, if now, the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a population of strangers five times in number to their own, it is not the fault of the Government of the United States, but comes from their own acts in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction, to become traders, farmers and to follow professional pursuits."

And, referring to the tribal lands, the report continued: "The theory of the Government was when it made title to the lands in the Indian Territory to the Indian tribes as bodies politic that the title was held for all of the Indians

of such tribe. All were to be the equal participators in the benefits to be derived from such holding. But we find in practice such is not the case. A few enterprising citizens of the tribe, frequently not Indians by blood but by intermarriage, have in fact become the practical owners of the best and greatest part of these lands, while the title still remains in the tribe—theoretically for all, yet in fact the great body of the tribe derives no more benefit from their title than the neighbors in Kansas, Arkansas or Missouri. . . . As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises what is the duty of the Government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the Government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights. In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection, and for the security of life, liberty and property. If the tribe fails to administer its trust properly by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to be no redress for the Indian so deprived of his rights, unless the Government does interfere to administer such trust."

The commission for which provision was made by the act of 1893—known as the Dawes Commission—also made reports to Congress (November 20, 1894, and November 18, 1895), "finding a deplorable state of affairs and the general prevalence of misrule." In the report of November 18, 1895, the commission said: "There is no alternative left to the United States but to assume the responsibility for future conditions in this Territory. It has created the forms of government which have brought

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about these results, and the continuance rests on its authority. . . . The commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect." *Stephens v. Cherokee Nation*, *supra*, pp. 452, 453.

By the acts of June 10, 1896, c. 398 (29 Stat. 321, 339), and of June 7, 1897, c. 3 (30 Stat. 62, 84), the authority of the Dawes Commission was continued and extended; and provision was made for the hearing and determination of applications for citizenship in the tribes and for the making of rolls of membership. It was further provided by the statute of 1897, that none of the acts, ordinances, and resolutions (with certain stated exceptions) of the council of either of the Five Tribes should take effect if disapproved by the President. Then followed the act of June 28, 1898, c. 517 (30 Stat. 495), a comprehensive statute embracing provisions as to the enrollment of members of the tribes and for the allotment of "the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment, among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location and value of the same." By this legislation "the United States practically assumed the full control over the Cherokees as well as the other nations constituting the five civilized tribes and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property." *Cherokee Nation v. Hitchcock*, *supra*, p. 306.

Between 1898 and 1902, allotment agreements with

the Five Civilized Tribes were approved by Congress. The allotment act of July 1, 1902, which related to the Cherokees (32 Stat. 716, c. 1375), provided (§ 63) that the tribal government should not continue longer than March 4, 1906. But by joint resolution of Congress passed March 2, 1906, the tribal existence and government of this tribe and of the others were "continued in full force and effect for all purposes under the existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law." 34 Stat. 822. A similar provision was contained in the act of April 26, 1906. 34 Stat. 137, 148.

The placing of restrictions upon the right of alienation was an essential part of the plan of individual allotment; and limitations were imposed by each of the allotment agreements. The separate statutes were supplemented by the general acts of 1906 and 1908, already mentioned. These restrictions evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning. That the conferring of citizenship was in no wise inconsistent with the retention of control over the disposition of the allotted lands, was expressly decided in the case of *Tiger v. Western Investment Co.*, *supra*, in which the conclusions of the court were thus stated (p. 316):

"Conceding that Marchie Tiger by the act conferring citizenship obtained a status which gave him certain civil and political rights, inhering in the privileges and immunities of such citizenship unnecessary to here discuss, he was still a ward of the Nation so far as the alienation of these lands was concerned, and a member of the existing Creek Nation. . . . Upon the matters involved our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in

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citizenship incompatible with this guardianship over the Indian's lands inherited from allottees as shown in this case; that in the present case when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian."

During the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review of its dealings with the tribes permits no other conclusion. Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed. "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." *United States v. Kagama*, 118 U. S. 375, 384.

This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust. When, in 1838, patent was issued

to the Cherokees providing that it was subject to the condition that the granted lands should revert to the United States if the Cherokee Nation became extinct or abandoned them, neither the rights nor the duties of the United States were confined to the reversionary interest thus secured. And its relinquishment made it no less a matter of national concern that the restrictions designed to protect the Indian allottees should be enforced. But this object could not be accomplished if the enforcement were left to the Indians themselves. It is no answer to say that conveyances obtained in violation of restrictions would be void. That, of course, is true, and yet, by means of the conveyances and the consequent assertion of rights of ownership by the grantees, the Indians might be deprived of the practical benefits of their allotments. It was the intent of Congress that, for their sustenance and as a fitting aid to their progress, they should be secure in their possession during the period specified and should actually hold and enjoy the allotted lands. As was well said by the court below, "If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation a pauperized, discontented and, possibly, beligerent people." The authority to enforce restrictions of this character is the necessary complement of the power to impose them.

Whether these restrictions upon the alienation of the allotted lands had been violated and the alleged convey-

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ances were void, was a justiciable question; and in order that it might properly discharge its duty, and that it might obtain adequate relief, suited to the nature of the case in accordance with the principles of equity, the United States was entitled to invoke the equity jurisdiction of its courts. It was not essential that it should have a pecuniary interest in the controversy. In *United States v. American Bell Telephone Co.*, 128 U. S. 315, 367, where the suit was brought to obtain the cancellation of certain patents, this court in commenting upon the statements which had been made in the case of *United States v. San Jacinto Tin Co.*, 125 U. S. 273, with respect to the right of the United States to sue, said: "This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the cases in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States. It is insisted that these decisions have reference exclusively to patents for land, and that they are not applicable to patents for inventions and discoveries. The

argument very largely urged for that view is the one just stated, that in the cases which had reference to patents for land the pecuniary interest of the United States was the foundation of the jurisdiction. This, however, is repelled by the language just cited, and by the fact that in more than one of the cases, notably in *United States v. Hughes*, *supra*, [11 How. 552], the right of the government to sustain the suit was based upon its legal or moral obligation to give a good title to another party who had a prior and a better claim to the land, but whose right was obstructed by the patent issued by the United States."

And in *In re Debs*, 158 U. S. 564, where the question was as to the jurisdiction of a court of equity at the suit of the Government to enjoin interference with the transportation of the mails, the court, while adverting to the fact that the United States had a property in the mails, declined to place its decision upon that ground alone, and rested it also upon governmental duty. The court said (pp. 584, 586): "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. . . . The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control."

In *United States v. Rickert*, 188 U. S. 432, the suit was brought to restrain the collection of certain county taxes alleged to be due in respect of permanent improvements

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on, and personal property used in the cultivation of, lands occupied by Sioux Indians in South Dakota. The lands had been allotted under the general allotment act of February 8, 1887, 24 Stat. 389. One of the questions certified to this court was whether the United States had such an interest in the controversy or in its subjects as entitled it to maintain the suit; and the question was answered in the affirmative. It is true that, in that case, the statute provided that the United States should hold the land allotted for twenty-five years in trust for the sole use and benefit of the Indian allottee. But the decision rested upon a broader foundation than the mere holding of a legal title to land in trust, and embraced the recognition of the interest of the United States in securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection. The court said (p. 444): "In view of the relation of the United States to the real and personal property in question, as well as to these dependent Indians still under national control, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the Government with reference to the Indians, it is clear that the United States is entitled to maintain this suit." By the act of August 15, 1894, c. 290, 28 Stat. 286, 305, as amended by the act of February 6, 1901, c. 217, 31 Stat. 760, Congress authorized suits to be brought against the United States, in its Circuit Courts, "involving the right of any person, in whole or in part of Indian blood or descent" (with certain exceptions) "to any allotment of lands under any law or treaty." *Sloan v. United States*, 193 U. S. 614. Prior to the amendment of 1901, the United States could not be sued in such a case. But the amendment required that "in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant." Commenting upon this, the court said in *McKay v. Kalyton*, 204 U. S. 458, 469: "Nothing could more clearly

demonstrate, than does this requirement, the conception of Congress that the United States continued as trustee to have an active interest in the proper disposition of allotted Indian lands and the necessity of its being made a party to controversies concerning the same, for the purpose of securing a harmonious and uniform operation of the legislation of Congress on the subject." And *In Matter of Heff*, 197 U. S. 488, 509, this court said: "In *United States v. Rickert*, 188 U. S. 432, we sustained the right of the Government to protect the lands thus allotted and patented from any encumbrance of state taxation. Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a National or a state court."

Not only was the United States entitled to prosecute this suit by virtue of the interest springing from its peculiar relations to the Indians and the course of dealing which had finally led to the plan of separate allotments accompanied by restrictions for the protection of the allottees, but Congress has explicitly recognized the right of the Government thus to enforce these restrictions and has made appropriations for the maintenance of suits of this description. And, at least, the power of Congress to authorize the Government to sue, in view of the relation of the United States to the subject-matter and of the nature of the question to be determined, cannot be doubted. *Minnesota v. Hitchcock*, 185 U. S. 373, 387, 388.

By the act of May 27, 1908, c. 199, 35 Stat. 312, which defined restrictions with respect to allotments to members of the Five Civilized Tribes, the representatives of the Secretary of the Interior were authorized to advise all allottees, having restricted lands, of their rights, and at the request of any such allottee to bring suit in his name

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to cancel any conveyance or incumbrance in violation of the act and to take all steps necessary to assist the allottees in acquiring and retaining possession. But the following provision was added (p. 314):

"Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act."

It is urged that this clause did not confer authority to sue, but was inserted merely to rebut any possible inference of an intention to deny this right to the United States. This seems to us a strained construction in view of the obvious purpose of the act. And it fails to give adequate effect to the words "such suits *to be brought* on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, *the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act.*" In addition to the appropriation of moneys for expenditure under the direction of the Secretary of the Interior, that act appropriated the sum of \$50,000 "to be immediately available and available until expended as the Attorney General may direct," which was "to be used in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the eastern judicial district of Oklahoma;" with the proviso that \$10,000 of this amount,

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or so much as might be necessary, should be expended in the prosecution of cases in the western judicial district of that State. In 1909 (act of March 4, 1909, c. 299, 35 Stat. 945, 1014), a further appropriation of a like sum for the same purposes was made under the heading "Suits to set aside conveyances of allotted lands." Another appropriation was made in 1910 (act of June 25, 1910, c. 384, 36 Stat. 703, 748), under a similar heading with specific reference to the "Five Civilized Tribes," and also with the provision "and not to exceed ten thousand dollars of said sum shall be available for the expenses of the United States on appeals to the Supreme Court of the United States;" and still another to the same effect in 1911 (act of March 4, 1911, c. 285, 36 Stat. 1363, 1425).

We conclude that the United States has the capacity to prosecute this suit.

It is further urged that there is a defect of parties, on account of the absence of the Indian grantors. It is said that they are the owners of the lands and hence sustain such a relation to the controversy that final decree cannot be made without affecting their interest. *Shields v. Barrow*, 17 How. 130, 139; *Williams v. Bankhead*, 19 Wall. 563.

The argument necessarily proceeds upon the assumption that the representation of these Indians by the United States is of an incomplete or inadequate character; that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit for the purpose of enforcing the restrictions Congress has imposed, and of thus securing possession to the Indians, their presence as parties to the suit is essential to their protection. This position is wholly untenable. There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not

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depend upon the Indian's acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. It was not necessary to make these grantors parties, for the Government was in court on their behalf. Their presence as parties could not add to, or detract from, the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances. As by the act of Congress they were precluded from alienating their lands, they were likewise precluded from taking any position in the legal proceedings instituted by the Government to enforce the restrictions which would render such proceedings ineffectual or give support to the prohibited acts. The cause could not be dismissed upon their consent; they could not compromise it; nor could they assume any attitude with respect to their interest which would derogate from its complete representation by the United States. This is involved necessarily in the conclusion that the United States is entitled to sue, and in the nature and purpose of the suit.

These considerations also dispose of the contention that by reason of the absence of the grantors as parties, the grantees are placed in danger of double litigation; so that if they should succeed here they would still be exposed to suit by the allottees. It is not pertinent to comment upon the improbability of the contingency, if it exists in legal contemplation. But if the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the

decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. *Kerrison v. Stewart*, 93 U. S. 155, 160; *Shaw v. Railroad Co.*, 100 U. S. 605, 611; *Beals v. Ill. &c. R. R. Co.*, 133 U. S. 290, 295. And it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question.

In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left under the acts of Congress to the discretion of the Executive Department. The allottee may be permitted to bring his own action, or if so brought the United States may aid him in its conduct, as in the *Tiger Case*. And, as already noted, the act of May 27, 1908, makes provision for proceedings by the representatives of the Secretary of the Interior in the name of the allottee. But in the opportunities thus afforded there is no room for the vexation of repeated litigation of the same controversy. And when the United States itself undertakes to represent the allottees of lands under restriction and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose relating to the same property.

It is said that the allottees have received the consideration and should be made parties in order that equitable restoration may be enforced. Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and

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thriftlessness which were the occasion of the measures for his protection would render them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute. *United States v. Trinidad Coal Co.*, 137 U. S. 160, 170, 171.

But it is suggested that there may be instances where the consideration could be restored without interfering with the policy which prohibited the transfer; that is, without in any way impairing the right to the recovery of the land or the assurance to the Indian of his possession free from incumbrance. It is said, for example, that there may have been an exchange of lands, and that the Indian grantor should not, on retaking the restricted lands, be permitted at the same time to retain those which he has received from the grantee. Or there may be other property held by the Indian grantor free from restrictions, so that restoration of the consideration may be enforced without working a deprivation of the restricted lands contrary to the act of Congress. We need not attempt to surmise what cases of this sort may arise. It is sufficient to say that no such case is here presented. It is not presented by the mere allegation of the bill that the conveyances assailed purport to have been made for pecuniary consideration. It will be competent for the court, on a proper showing as to any of the transactions that provision can be made for a return of the consideration, consistently with the cancellation of the conveyances and with securing to the allottees the possession of the restricted lands in accordance with the statute, to provide for bringing in as a party to the suit any person whose presence for that purpose is found to be necessary.

A further objection is that the bill is multifarious. But in view of the numerous transfers which the Government attacks, it was manifestly in the interest of the convenient administration of justice that unnecessary suits should be avoided and that transactions presenting the same question for determination should be grouped in a single proceeding. The objection to the misjoinder of causes of action is likewise without merit.

Our conclusion is that the suit was well brought. The judgment of the court below is affirmed with the modification that the cause shall proceed in conformity with this opinion.

It is so ordered.

MR. JUSTICE LURTON dissents on the question of jurisdiction, but not on the merits.

MULLEN *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 404. Argued October 12, 13, 1911.—Decided April 15, 1912.

The relations of the United States and the Choctaw Indians by treaties and statutes in regard to the allotment of lands and the restriction of alienation reviewed, and *held* that where a person, whose name appeared upon the rolls of the Choctaw Indians, died after the ratification of the agreement of distribution and before receiving the allotment, there was no provision for restriction but the land passed at once to his heirs; in such cases the United States cannot maintain an action to set aside conveyances made by the heirs within the period of restriction applicable to homestead allotments made to members of the tribe during life.

179 Fed. Rep. 13, reversed as to this point.

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THE facts, which involve the validity of certain conveyances of allotted land made by Choctaw Indians and also the right of the United States to have such conveyances set aside, are stated in the opinion.

*Mr. J. C. Stone, Mr. Robert J. Boone and Mr. S. T. Bledsoe, with whom Mr. J. R. Cottingham was on the brief, for appellants.*¹

*The Solicitor General and Mr. A. N. Frost and Mr. Harlow A. Leekley, Special Assistants to the Attorney General, for the United States.*¹

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought by the United States to cancel certain conveyances of allotted lands, made by Choctaw Indians in alleged violation of restrictions. The Circuit Court sustained a demurrer to the bill upon the grounds that the United States was not entitled to maintain a suit of this character; that there was a defect of parties, owing to the absence of the Indian grantors, and that the bill was multifarious. This judgment was reversed by the Circuit Court of Appeals, which directed the trial court to proceed with the cause in accordance with its opinion. *United States v. Allen, and similar cases*, 179 Fed. Rep. 13. An appeal to this court is taken by certain defendants under § 3 of the act of June 25, 1910, c. 408, 36 Stat. 837. The lands, conveyed to the appellants, are described as those which had been allotted to Choctaws of the full-blood, deceased, and the conveyances were made by their heirs (also Choctaws of the full-blood) prior to April 26, 1906.

As early as 1786 (January 3) a treaty was made with the representatives of the Choctaws by which it was acknowledged that these Indians were under the protection

¹ See abstract of arguments in *Heckman v. United States*, ante, p. 413.

of the United States and it was provided that for their "benefit and comfort" and for the "prevention of injuries and oppressions" the United States should have "the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper." 7 Stat. 21. By the treaty of 1820 (October 18) in order "to promote the civilization of the Choctaw Indians, by the establishment of schools amongst them; and to perpetuate them as a nation, by exchanging, for a small part of their land here, a country beyond the Mississippi River, where all, who live by hunting and will not work, may be collected and settled together," there was ceded to the Choctaws a tract west of the Mississippi situated between the Arkansas and Red rivers. 7 Stat. 210. In furtherance of this purpose, another treaty was made in 1830 (September 27) by which it was agreed that the United States should "cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," and the Choctaws ceded to the United States all their lands east of the Mississippi and promised to remove beyond that river as soon as possible. 7 Stat. 333, 334. In 1837 (January 17), with the approval of the President and Senate of the United States, an agreement was made between the Choctaws and the Chickasaws that the latter should have the privilege of forming a district within the limits of the Choctaw country "to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw Nation." 11 Stat. 573. Controversies having arisen between these tribes, a treaty was made in 1855 (June 22) with the representatives of both, defining boundaries and providing for the settlement of differences. This contained the stipulation: "And pursuant to an act

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of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: *Provided, however*, no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct, or abandon the same." 11 Stat. 612. After the Civil War, a new treaty was entered into reaffirming the obligations arising out of prior agreements and legislation. April 28, 1866, 14 Stat. 765, 774. While this treaty contemplated allotments in severalty and made provision to that end, effective action was not taken until the legislation of 1893, and subsequent years, relating to the Five Civilized Tribes, which embodied the policy—of individual allotments and the dissolution of the tribal governments—made necessary by the changed conditions in the Indian country. Acts of March 3, 1893, c. 209, 27 Stat. 645; June 10, 1896, c. 398, 29 Stat. 321, 339; June 7, 1897, c. 3, 30 Stat. 62, 64; June 28, 1898, c. 517, 30 Stat. 495.

In the case of the Choctaws and Chickasaws, as in that of the other tribes, the scheme of allotments embraced certain restrictions upon the right of alienation which Congress deemed necessary for the suitable protection of the allottees. By virtue of the relation of the United States to these Indians (*Choctaw Nation v. United States*, 119 U. S. 1, 28; *United States v. Choctaw Nation and Chickasaw Nation*, 179 U. S. 494, 532), and the obligations it has assumed, it is entitled to invoke the equity jurisdiction of its courts for the purpose of enforcing these restrictions. The Indian grantors, being represented by the Government, were not necessary parties, and in the interest of the convenient administration of justice it was competent to

embrace in one suit a class of transactions presenting the same question for determination. *Heckman v. United States*, ante, p. 413.

The question remains whether, in the execution of the conveyances to the appellants, the restrictions imposed by Congress have been violated.

The Dawes Commission, constituted by the act of 1893, entered into an agreement with the Choctaws and Chickasaws—known as the Atoka agreement—which was approved by Congress and incorporated in § 29 of the act of June 28, 1898. 30 Stat. 505. There was, however, a supplemental agreement, found in the act of July 1, 1902, 32 Stat. 641, c. 1362, which contains the restrictions in force at the time of the conveyances described in the bill.

This supplemental agreement provided that there should be allotted to each member of the Choctaw and Chickasaw tribes land equal in value to 320 acres of the average allottable land of these tribes; and to each Choctaw and Chickasaw freedman, land equal in value to forty acres. The scheme defined two classes of cases, (1) allotments made to members of the tribes, and to freedmen, living at the time of allotment, and (2) allotments made in the case of those whose names appeared upon the tribal rolls but who had died after the ratification of the agreement and before the actual allotment had been made.

With respect to allotments to living members, it was provided that the allottee should designate 160 acres of the allotted lands as a homestead, for which separate certificate and patent should issue. And the restrictions upon the right of alienation of the allotted lands are found in paragraphs 12, 13, 15 and 16 of the supplemental agreement, as follows:

"12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred

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and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

"13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.

"15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided.

"16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent; *Provided*, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

It will be observed that the homestead lands are made inalienable "during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment." The period of restriction is thus definitely limited, and the clear implication is that when the prescribed period expired the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee himself at the end of the twenty-one years. Thus, with respect to homestead lands, the supplemental agreement imposed no restriction upon alienation by the heirs of a deceased allottee. And the reason may be found in the fact that each member of the tribes—each minor child

as well as each adult, duly enrolled as required—was to have his or her allotment; so that each member was already provided with a homestead as a part of the allotment, independently of the lands which might be acquired by descent. On the other hand, the proviso of paragraph 16—which relates to the additional portion of the allotment, or the so-called “surplus” lands—contains a restriction upon alienation not only by the allottee, but by his heirs. Whatever may have been the purpose, a distinction was thus made with regard to the disposition by heirs of the homestead and surplus lands respectively.

The question now presented—with regard to the conveyances made to the appellants—arises in the second class of cases, that is, where a person whose name appeared upon the rolls died after the ratification of the agreement and before receiving his allotment. In this event, provision was made for allotment in the name of the deceased person, and for the descent of the lands to his heirs. This is contained in paragraph 22 of the supplemental agreement:

“22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield’s Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.”

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In the cases falling within this paragraph, there is no requirement for the selection of any portion of the allotted lands as a homestead, and there is no ground for supposing that it was the intention of Congress that a provision for such selection should be read into the paragraph so as to assimilate it to paragraph 12 relating to allotments to living members. While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe, and where there were a number of heirs each would take his undivided share. It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of a portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute.

In the agreement with the Creek Indians (act of March 1, 1901, 31 Stat. 861, 870, c. 676) it was provided that in the case of the death of a citizen of the tribe after his name had been placed upon the tribal roll made by the Commission, and before receiving his allotment, the lands and money to which he would have been entitled, if living, should descend to his heirs "and be allotted and distributed to them accordingly." The question arose whether in such cases there should be a designation of a portion of the allotment as a homestead. In an opinion under date of March 16, 1903, the then Assistant Attorney General for the Interior Department (Mr. Van Devanter) advised the Secretary of the Interior that this was not required by the statute. He said: "After a careful con-

sideration of the provisions of law pertinent to the question presented, and of the views of the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes, I agree with the latter that in all cases where allotment is made directly to an enrolled citizen, it is necessary that a homestead be selected therefrom and conveyed to him by separate deed, but that where the allotment is made directly to the heirs of a deceased citizen there is no reason or necessity for designating a homestead out of such lands or of giving the heirs a separate deed for any portion of the allotment, and therefore advise the adoption of that rule." It is true that under the Creek agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the *name* of the deceased member and "descend to his heirs." This, however, is a merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs and the mere circumstance that under the language of the statute the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead.

We have, then, a case where all the allotted lands going to the heirs are of the same character and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one-half of them, constituting homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell "surplus" lands. But, on examining the context, it appears that this provision is part of the scheme for allotments to living members, where there is a segregation of homestead and surplus lands

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respectively. Whatever the policy of such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22 where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases so as to make it applicable to all the lands taken by the heirs, and there is no occasion, or authority, for creating a division of the lands so as to impose a restriction upon a part of them.

There being no restriction upon the right of alienation, the heirs in the cases involved in this appeal were entitled to make the conveyances. The bill alleged that the tracts embraced in these conveyances were "allotted lands," and certificates of allotment had been issued. These Indian heirs were vested with an interest in the property which in the absence of any provision to the contrary was the subject of sale. The fact that they were "full-blood" Indians makes no difference in this case for, at the time of the conveyances in question, heirs of the full-blood taking under the provisions of paragraph 22 of the supplemental agreement had the same right of alienation as other heirs.

It does not appear from the allegations of the bill whether patents for the lands had been issued to the Indian grantors before the conveyances were made. But as the lands had been duly allotted, the right to patent was established; and there was no restriction in cases under paragraph 22 upon alienation of the lands prior to the date of patent. There was undoubtedly a complete equitable interest which, in the absence of restriction, the owner could convey. *Doe v. Wilson*, 23 How. 457; *Crews v. Burcham*, 1 Black, 352; *Jones v. Meehan*, 175 U. S. 1, 15-18. And any contention that the conveyances were invalid, solely because they were made before the issuance of patent—the lands not being under restriction—would be met by the proviso contained in § 19 of the act of

April 26, 1906, 34 Stat. 137, 144, c. 1876: "*Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void."

We are therefore of the opinion that the bill is without equity as against the appellants for the reason that the conveyances were not executed in violation of any restrictions imposed by Congress, and that the demurrer should have been sustained upon this ground. It follows that, with respect to the appellants, the decree of the Circuit Court of Appeals must be reversed and that of the Circuit Court affirmed.

It is so ordered.

GOAT *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

No. 405. Argued October 12, 13, 1911.—Decided April 29, 1912.

Heckman v. United States, ante, p. 413, followed to effect that the United States has capacity to maintain a suit in equity to set aside conveyances of allotted lands made by allottee Indians in violation of statutory restrictions.

The question in this case is: What are the restrictions in the case of allotments to Seminole freedmen?

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The relations of the United States to Seminole freedmen by treaties and statutes reviewed, and *held* that the United States is entitled to maintain an action to set aside all conveyances made by Seminole freedmen of homestead lands, of surplus lands made by minor allottees, and by adult allottees if made prior to April 21, 1904; but that such an action cannot be maintained as to conveyances made by adult allottees after April 21, 1904.

179 Fed. Rep. 13, modified and affirmed as to this point.

THE facts, which involve the validity of certain conveyances of allotted lands made by Seminole Indians and also the right of the United States to have such conveyances set aside, are stated in the opinion.

*Mr. J. C. Stone, Mr. Robert J. Boone and Mr. S. T. Bledsoe, with whom Mr. Geo. C. Crump, Mr. H. H. Rogers, Mr. J. H. Maxey, Mr. J. H. Miley and Mr. B. B. Blakeney were on the brief, for appellants.*¹

*The Solicitor General and Mr. A. N. Frost and Mr. Harlow A. Leekley, Special Assistants to the Attorney General, for the United States.*¹

MR. JUSTICE HUGHES delivered the opinion of the court.

The question presented by this appeal is with respect to the right of Seminole freedmen to convey the lands allotted to them in severalty pursuant to the act of July 1, 1898, c. 542, 30 Stat. 567. The United States sued to cancel conveyances alleged to have been made contrary to the statute. Demurrer to the bill was sustained by the Circuit Court, and its judgment was reversed by the Circuit Court of Appeals. *United States v. Allen, and similar cases*, 179 Fed. Rep. 13. So far as the demurrer contested the capacity of the United States to bring a suit of this character, the case stands upon the same footing, in all

¹ See abstract of arguments in *Heckman v. United States*, ante, p. 413.

material respects, as that of *Heckman v. United States*, ante, p. 413, and the right of the United States to enforce such restrictions as may have been imposed upon the alienation of the allotted lands is no longer open to dispute.

The inquiry must be, What are the restrictions in the case of allotments to Seminole freedmen, and have they been violated?

As to each of the tracts of land in question, it was alleged:

"And your orator further shows that each of the tracts of land hereinafter, in paragraph numbered six, described is situated in the Eastern District of Oklahoma, and was, at the time of the transactions of sale or incumbrance mentioned in that paragraph, allotted lands of the members of the Seminole tribe of Indians, allotted to freedman members of said tribe, and none were lands which had been patented to individuals at the time of the transactions in question; that they were not lands of heirs of allottees; that all contracts for the sale, disposition of any of said allotments prior to the date of patent were expressly, declared by law, to be void; that this law applied to all allotments of Seminole lands not inherited from allottees; that accordingly, defendants had knowledge and were, by said law, put upon inquiry and notice as to the inalienability of said unpatented lands, and had notice accordingly that the particular tracts had not been patented, any such patenting being a matter of public record and of public action; that moreover, the unpatented condition of said allotted lands was notorious and of common knowledge, since none of the Seminole allotted lands have been patented; and that other public laws of Congress and public agreements imposed further restrictions upon the transfer and incumbrance of the particular lands herein, in paragraph six, described, belonging to the particular class of tribal members herein

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mentioned, in addition to those arising from the absence of patenting, and these restrictions were known, notified and notorious in like manner."

While it appears that a large number of conveyances are involved in the suit, only two are specifically described in the printed record on this appeal, the descriptions of the others, as set forth in the bill, having been omitted by stipulation. In the two cases particularly mentioned, the conveyances were made in August, 1906, and March, 1907. It is not stated whether the lands, embraced therein, were homestead or so-called "surplus" lands, but it is conceded in argument that they were of the latter class. The Government says in its brief: "In the printed record it happens that the transactions set out include only lands allotted other than homestead, but other transactions complained of in the bill, omitted from the printed record for the sake of brevity, include lands allotted as homesteads as well." The broad ground is taken by the Government that all conveyances of the lands allotted to members of the Seminole tribe are void because made prior to the date of patent.

By the treaty of 1832 (7 Stat. 368) the Seminoles relinquished to the United States their claim to the lands then occupied in the territory of Florida and agreed to emigrate to the lands assigned to the Creeks west of the Mississippi, it being understood that an additional extent of territory proportioned to their numbers should "be added to the Creek country," and that they should be received "as a constituent part of the Creek Nation." Provision to this effect was made in the Creek treaty of 1833 (7 Stat. 417, 419), which was satisfactory to the Seminoles, and territory was assigned to them accordingly. 7 Stat. 423. There were further agreements in 1845 (9 Stat. 821) and in 1856 (11 Stat. 699). In 1866 (14 Stat. 755), lands which had been ceded to the Seminoles by the Creeks were conveyed to the United States at a stipulated price;

and the United States, having obtained from the Creeks the westerly half of their lands, granted to the Seminoles a tract of 200,000 acres, which was to constitute the national domain of the latter. Subsequently, the United States purchased for the Seminoles another tract, on the east, consisting of 175,000 acres. Acts of March 3, 1873, 17 Stat. 626; August 5, 1882, 22 Stat. 257, 265, c. 390. It was provided in the treaty of 1866, inasmuch as there were among the Seminoles "many persons of African descent and blood, who have no interest or property in the soil and no recognized civil rights," that "these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color who may be adopted as citizens or members of said tribe."

Pursuant to the policy of allotting tribal lands among the individual members of the Five Civilized Tribes (act of March 3, 1893, c. 209, 27 Stat. 645), an agreement was made by the Dawes Commission with the Seminoles on December 16, 1897, which was ratified by the act of July 1, 1898. This agreement provided (30 Stat. 567, c. 542):

"All lands belonging to the Seminole tribe of Indians shall be divided into three classes, designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents, and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered; giving to each the right to select his allotment so as to include any improvements thereon, owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him,

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during the existence of the present tribal government, and until the members of said tribe shall have become citizens of the United States. Such allotment shall be made under the direction and supervision of the Commission to the Five Civilized Tribes in connection with a representative appointed by the tribal government; and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him.

"All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void."

Leases by allottees were permitted upon certain conditions.

The deeds of the allotted lands were to be executed at the termination of the tribal government and each allottee was to designate forty acres which by the terms of the deed should be inalienable and nontaxable as a homestead in perpetuity. The provision on this subject was as follows:

"When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of

forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity."

A supplemental agreement was made with the Seminoles on October 7, 1899, ratified on June 2, 1900 (31 Stat. 250, c. 610), which provided for the enrollment of children born to Seminole citizens to and including December 31, 1899, and all Seminole citizens then living, and also that if any member of the tribe should die after that date the lands, money and other property to which he would be entitled if living should descend to his heirs.

The act of March 3, 1903, c. 994, § 8 (32 Stat. 982, 1008), contained the following provisions as to the duration of the tribal government, the execution, delivery and recording of deeds and the inalienability of homesteads:

"SEC. 8. That the tribal government of the Seminole Nation shall not continue longer than March fourth, nineteen hundred and six: *Provided*, That the Secretary of the Interior shall at the proper time furnish the principal chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation contained in the Act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes, page five hundred and sixty-seven), and said principal chief shall execute and deliver said deeds to the Indian allottees as required by said Act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee until further legislation by Congress, and such records shall have like effect as other public records: *Provided further*, That the homestead referred to in said Act shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment. A separate deed shall be issued for said homestead, and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof."

The restriction upon the alienation of homestead lands applied as well to the freedmen as to the other allottees; but it was removed, with respect to the freedmen, by the act of May 27, 1908, c. 199 (35 Stat. 312). This statute, in fixing the status—after sixty days from the date of the act—of the lands of allottees of the Five Civilized Tribes, theretofore or thereafter allotted, provided: "All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions." The present bill was filed on July 23, 1908, and the conveyances it assails were executed before this provision of the act of 1908 became operative. Previous conveyances were not validated by the statute, but on the contrary it declared any attempted alienation or incumbrance of allotted lands, prior to the removal of restrictions, to be void. Section 5, *Id.* 313. It follows that the instruments described in the bill, in so far as they may have purported to convey homestead lands, were executed in violation of law and the Government was entitled to have them set aside.

The "surplus" lands were embraced in the general restriction contained in the agreement of December 16, 1897, ratified by the act of July 1, 1898, that "all contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void." Apart from the provisions as to leases, this was the only restriction upon the alienation of surplus lands imposed by that agreement, and no further restriction applicable to the freedmen allottees was placed upon such lands by subsequent statute.

The situation with respect to the Seminole allotments may be briefly stated. The commissioners to the Five Civilized Tribes found little difficulty in preparing the rolls of the Seminoles or in making the allotments. The enrollment following the ratification of the agreement of

1897 was begun in July, 1898, and was finished in August of that year. The rolls containing the additional names, provision for which was made by the supplemental agreement of 1899, were forwarded to the Department in December, 1900, and were approved by the Secretary of the Interior on April 2, 1901. (Reports of Commission to Five Civilized Tribes, 1900, p. 12; 1901, p. 30.) In June, 1901, the commission undertook the making of allotments and this was practically completed at an early date. In their report for 1903 (pp. 36, 37), the commissioners said: "The last annual report of the Commission showed the completion of allotment in the Seminole Nation, save as to the recording of a small number of allotments, and the issuance of certificates therefor, which was finished early in the past year." Subsequently there were additional allotments to after-born children in accordance with the act of March 3, 1905. 33 Stat. 1048, 1071, c. 1479. As already noted, the allottees were to receive their deeds on the expiration of the tribal government which, by the act of 1903, was not to continue longer than March 4, 1906. By joint resolution of March 2, 1906, Congress provided for the continuance of "the tribal existence and the present tribal governments" of the Five Civilized Tribes "in full force and effect for all purposes under existing laws," until all the property of the tribes should be distributed (34 Stat. 822); and by the act of April 26, 1906, they were continued "until otherwise provided by law" (§ 28, 34 Stat. 137, 148, c. 1876). While the duration of the tribal government was thus extended, the last mentioned statute expressly authorized the principal chief of the Seminoles meanwhile, that is, before its termination, to execute deeds to allottees. (Section 6, *Id.* 139.) These deeds, however, had not been delivered at the time of the conveyances in question. None of the lands, says the bill, had been patented to individuals, and they were not lands of heirs of allottees.

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It is urged that the time for the issuance of patents was fixed as the fourth of March, 1906, and that in law they will be deemed to have been delivered on that date or within a reasonable time thereafter; that although provision was made for the continuance of the tribal government, there was likewise authority for the delivery of the deeds prior to its termination. The contention that the restriction was thus removed cannot be sustained. The agreement of 1897 did not fix a definite time for the termination of the tribal government, and while the act of 1903 set a limit to its existence, Congress was competent to extend it. This was done, and the mere authorization of the execution of patents before the tribal government ceased to exist, cannot be regarded as a repeal of the explicit provision that contracts for the sale or incumbrance of the allotted lands prior to the date of patent should be void. The one did not override the other; they could stand together.

But, in 1904—after the allotments to the Seminoles had been made—the restrictions upon the alienation by adult allottees of the five civilized tribes, who were not of Indian blood, of lands other than homesteads were removed. The provision was as follows (act of April 21, 1904, c. 1402, 33 Stat. 189, 204):

“And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such

removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded."

This statute undoubtedly applied to allottees of the Seminole Nation, as one of the Five Civilized Tribes, and the enrolled freedmen of that tribe, according to the classification of the commission in making the rolls, fell within the description of allottees "not of Indian blood." The freedmen were persons of African descent—embracing former slaves and their descendants—who had been admitted to the rights of native citizens under the treaty of 1866. (Report of Dawes Commission, 1898, pp. 11, 13.) While the law did not prescribe that a separate roll of freedmen should be made in the case of the Seminoles, the commission in fact made one. As to this they said in their report for 1898 (p. 13), referring to the Seminoles: "Indeed, it is essentially a nation of full-bloods, save as to its colored citizens, who, under treaty provision, are on an equal footing with the citizens by blood. About one-third of the citizens of the Seminole Nation are freedmen, and while the law does not specifically require a separate roll of each of these classes, the commission's data will enable it to so separate them." Accordingly the freedmen in the rolls of the Seminoles, upon which the allotments were based, appear as a class distinct from the citizens by blood. (Final Rolls of Citizens and Freedmen of the Five Civilized Tribes, pp. 615, 627.) And the commissioner to the Five Civilized Tribes in his report for 1908 (p. 7), in stating the total number of the enrolled Seminoles, with the degree of blood of each, gives the number of the citizens of full-blood and of mixed-blood, three-fourths or more, one-half to three-fourths, and less than one-half blood, and then the number of the enrolled freedmen as a separate group. The bill does not allege that the allottees in

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question had any Indian blood, but describes them simply as "freedmen members of said tribe," and in the specifications of the conveyances which appear in the record the grantors are named as Seminole freedmen whose names are on the freedmen roll. The import of the allegation, then, is that these grantors were not of Indian blood, and, so far as they were adults, they came within the provision of the act of 1904, removing restrictions upon the alienation of surplus lands.

These adult grantors stood in precisely the same position—after the act of 1904—as though they had received their allotments without any restriction upon their right to alienate the interest thus acquired. It is insisted, however, that this interest was not of such a character as to be susceptible of transfer. This is not a tenable proposition. Stress is laid upon the provision in the agreement of 1897 that each allottee should have "the sole right of occupancy of the land so allotted to him." But it is not to be supposed that by this form of words Congress intended in the case of the Seminoles to provide that, by virtue of the allotment, the member of the tribe should receive an interest of a different nature from that received by allottees of other tribes. The lands were allotted to the members of the tribe in severalty, so that each should have his distinct portion. The allotments constituted their respective shares of the tribal property, set apart to them as such, and while the execution of the deeds was deferred, each had meanwhile a complete equitable interest in the land allotted to him. The nature of the allottee's interest is sufficiently shown by other provisions of the agreement of 1897, as ratified by Congress, and by statutes *in pari materia*. In the agreement it was provided that any allottee might lease his allotment on certain conditions. With respect to the townsite of Wewoka, which was to be controlled and disposed of according to the provisions of the act of the General Council of the

Seminole Nation of April 23, 1897, it was provided that on extinguishment of the tribal government deeds should issue "to owners of lots" as in the case of allottees. The interest of the allottee was a descendible interest. By the supplemental agreement of 1900, in the case of the death of a member of the tribe after December 31, 1899, the lands "to which he would be entitled if living" were to descend to his heirs. Section 5 of the act of April 26, 1906, relating to "patents or deeds to allottees in any of the Five Civilized Tribes" to be thereafter issued—thus including those to be issued to the Seminole allottees—provided that if any such allottee should die before the deed became effective the title to the lands described therein should "inure to and vest in his heirs," and further, that "in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life" (34 Stat. 137, 138, c. 1876); and § 19 of that act (p. 144) contained a proviso declaring that conveyances theretofore made "by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed."

The inalienability of the allotted lands was not due to the quality of the interest of the allottee, but to the express restriction imposed. Their equitable interest was one which in the absence of restriction they could convey. *Doe v. Wilson*, 23 How. 457; *Crews v. Burcham*, 1 Black, 352; *Barney v. Dolph*, 97 U. S. 652, 656; *Jones v. Meehan*, 175 U. S. 1, 15-18; *Godfrey v. Iowa Land & Trust Co.*, 21 Oklahoma, 293; 95 Pac. Rep. 792; *Mullen v. United States*, April 15, 1912, *ante*, p. 448. And, hence, on the removal of the restrictions upon alienation, the adult allottees not of

Indian blood were entitled to convey their surplus lands. So far as the bill assails such conveyances it is without equity.

As all the conveyances made to the appellants are not particularly described in the printed record before this court, it is impossible to specify those which were lawful and those which were obnoxious to the statute. We are of opinion (1) that the bill should be sustained so far as it relates to conveyances of homestead lands; (2) that it should also be sustained to the extent that it is directed against conveyances of surplus lands made by freedmen allottees who were minors and thus excepted from the provision of the act of April 21, 1904, and those made by adult allottees prior to that date; and (3) that so far as the bill relates to conveyances of surplus lands made by adult freedmen allottees subsequent to April 21, 1904, it should be dismissed.

The judgment of the Circuit Court of Appeals will therefore be affirmed, with the modification that the cause shall proceed in conformity with this opinion.

It is so ordered.

DEMING INVESTMENT COMPANY v. UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 434. Argued October 12, 13, 1911.—Decided April 29, 1912.

Goat v. United States, ante, p. 458, followed in regard to validity of conveyances of lands allotted to Seminole Indians, and the right of the United States to maintain actions to set such conveyances aside. 179 Fed. Rep. 13, modified and affirmed as to this point.

THE facts, which involve the validity of certain deeds and mortgages of allotted lands made by Seminole In-

dians and the right of the United States to have the same set aside, are stated in the opinion.

*Mr. J. C. Stone, Mr. Robert J. Boone and Mr. S. T. Bledsoe, for appellants.*¹

*The Solicitor General and Mr. A. N. Frost and Mr. Harlow A. Leekley, Special Assistants to the Attorney General, for the United States.*¹

MR. JUSTICE HUGHES delivered the opinion of the court.

The United States sought by this suit to cancel certain deeds and mortgages of lands allotted to members of the Seminole tribe of Indians. The judgment of the Circuit Court, sustaining demurrers to the bill, was reversed by the Circuit Court of Appeals. *United States v. Allen, and similar cases*, 179 Fed. Rep. 13.

The suit was brought on July 22, 1908, and embraced several conveyances to distinct grantees. This appeal is prosecuted—under § 3 of the act of June 25, 1910, c. 409, 36 Stat. 837—by only one of the defendants, The Deming Investment Company, of Oklahoma City.

The bill attacks mortgages made to this appellant, by others than the allottees, during the months of August, October and December, 1906. It is alleged that they were attempted incumbrances of allotted lands of members of the Seminole tribe; that none of these lands had been patented to individuals at the time of the transactions; and that all contracts for the sale, disposition and incumbrance of the lands prior to the date of patent were expressly declared by law to be void. (Agreement of December 16, 1897, ratified by the act of July 1, 1898, c. 542, 30 Stat. 567.)

In its brief the appellant states that "each conveyance only involves the surplus allotment and not the home-

¹ See abstract of arguments in *Heckman v. United States*, ante, p. 413.

stead of the particular allottee," a statement which we do not understand the Government to challenge so far as the mortgages to the appellant are concerned. The bill does not allege that these mortgages, or any of them, embraced homestead lands.

Nor is it alleged in the bill that any of the allottees whose allotments had been mortgaged to the appellant were of Indian blood, but the lands are described as those which had been allotted to Seminole freedmen whose names appear upon the freedmen rolls of that tribe. Upon the allegations of the bill, these allottees, so far as they were adults, must be held to come within the provision of the act of April 21, 1904, c. 1402 (33 Stat. 189, 204), which removed all restrictions upon alienation by adult allottees not of Indian blood with respect to their surplus lands; and, by virtue of the allotment, they had an interest in the allotted lands which on the removal of the restriction they were entitled to convey. *Goat v. United States*, decided this day, *ante*, p. 458.

Minors were excepted from this enabling provision of the act of 1904; and in one instance the mortgage is described as covering a portion of the allotment of a minor freedmen allottee, Ellen Sango, age 17. In this, as in other cases, the age of the allottees is given apparently as of the time when the mortgage was executed. The dates of the conveyances made by the allottees are not set forth.

Upon the authority of *Goat v. United States*, *supra*, the bill, with respect to the appellant, should be sustained so far as it relates to mortgages covering lands which had been conveyed by minor allottees, or by adult allottees before April 21, 1904; and it should be dismissed as to the surplus lands conveyed by adult freedmen allottees subsequent to that date. The judgment of the Circuit Court of Appeals is affirmed, with the modification that the cause shall proceed in conformity with this opinion.

It is so ordered.